Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, BILLY CYPRESS, JASPER NELSON, JIMMIE BERT, MAX BILLIE, HENRY BERT and DEXTER LEHTINEN,

Petitioners,

v.

TAMIAMI PARTNERS, LTD. by and through its general partner, TAMIAMI DEVELOPMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal courts have subject matter jurisdiction over a contract dispute between the management contractor and the Miccosukee Tribe: (a) Does the Indian Gaming Regulatory Act ("IGRA") provide management contractors with a private cause of action against Indian Tribes; (b) Did the Eleventh Circuit err in finding that the district court had subject matter jurisdiction over the arbitration alleged to have been conducted pursuant to that contract, and should the Tribe be subjected to litigation when it is clear both on the face of the statute and in the legislative history that no private cause of action exists under IGRA for management contractors?

2. Whether the Eleventh Circuit erred in implying a waiver of the Tribe's sovereign immunity for claims under IGRA when the Tribe only waived sovereign immunity with regard to arbitration, a contractual claim, and not for any claims under IGRA?

PARTIES TO THE PROCEEDING

The Plaintiffs list the parties as follows:

1. The Miccosukee Tribe of Indians of Florida, Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert and Dexter Lehtinen (Petitioners/Defendants).

2. Tamiami Partners, Ltd. and Tamiami Development Corporation (Respondents/Plaintiffs).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
A. Course of Proceedings, Disposition in Court Below	2
1. General Background	2
2. Summary of Eleventh Circuit decisions	3
B. Statement of Facts	6
Reasons for Granting the Writ	10
Summary of Argument	10

Contents

Page

I. The Eleventh Circuit Panel Erred In Concluding That There Was Subject Matter Jurisdiction For TPL's Arbitration Claims Against The Tribe Under IGRA. 12

II. The Panel Erred In Concluding That The Tribe Waived Sovereign Immunity To Claims Under IGRA By The Management Contractor Against The Tribe. 20

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

American Fire and Casualty Co. v. Finn, 341 U.S. 6 (1951) 3

Baggett v. First National Bank of Gainesville, 117 F.3d 1342 (11th Cir. 1997) 13, 14

Basso v. Utah Power and Light Co., 495 F.2d 906 (10th Cir. 1974) 13

Calvello v. Yankton Sioux Tribe, 899 F. Supp. 431 (D.S.D. 1995), *appeal dismissed*, 89 F.3d 840 (8th Cir. 1996) 22

California v. Cabazon, 480 U.S. 202 (1987) 15

Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997) 20

Cort v. Ash, 422 U.S. 66 (1975) 14, 15, 16, 19

Davids v. Coyhis, 869 F. Supp. 1401 (E.D. Wis. 1994) 5

Ex parte Young, 209 U.S. 123 (1908) 5

Florida v. Seminole Tribe of Fla, 181 F.3d 1237 (11th Cir. 1999) 20

Cited Authorities

Page

Florida Paraplegic v. Miccosukee, 166 F.3d 1126 (11th Cir. 1999) 20

Groundhog v. Keller, 442 F.2d 674 (10th Cir. 1971) 13

In re United States ex rel. Hall, 825 F. Supp. 1422 (D. Minn. 1993), *aff'd*, 27 F.3d 572 (8th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995) 14

Jimi Development Corp. v. Ute Mountain Indian Tribe, 930 F. Supp. 493 (D. Colo. 1996) 14

Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., 523 U.S. 751 (1998) 20

Lamb v. Griffin Television, Inc., 804 F. Supp. 1430 (W.D. Okla. 1992) 18

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 20

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 4

Nicholson v. Hooters, 136 F.3d 1287 (11th Cir. 1998) 18

Platzer v. Sloan-Kettering Inst. for Cancer Research, 787 F. Supp. 360 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1086, *cert denied*, 507 U.S. 1006 (1993) 18

Cited Authorities

Page

Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd sub nom., Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986) 18

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 20, 22

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 15, 17, 19

Whiteco Metrocom Div. of Whiteco Industries, Inc. v. Yankton Sioux Tribe, 902 F. Supp. 199 (D.S.D. 1995) 14

Wilderness Society v. Alcock, 83 F.3d 386 (11th Cir. 1986) 16

Statutes:

25 U.S.C. § 461, *et seq.* 7

25 U.S.C. § 476 7

25 U.S.C. § 2701, *et seq.* 2, 7

25 U.S.C. § 2701(4) 15

25 U.S.C. § 2701(5) 15

25 U.S.C. § 2702(2) 7, 16

25 U.S.C. § 2710 ..... 15, 16

Cited Authorities

	Page
25 U.S.C. § 2710(b)	7
25 U.S.C. § 2711	7, 16
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	4
Rule:	
Fed. R. Civ. P. 12(b)(6)	18
Other Authority:	
S. Rep. 100 Cong., No. 100-446, *reprinted in*, 1988 U.S.C.C.A.N. 3071, 3083-84	16

TABLE OF APPENDICES

Page

Appendix A — Opinion And Order Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed June 7, 1999 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida On Pending Motions Dated And Filed September 27, 1996 ..... 31a

Appendix C — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated August 16, 1995 ..... 38a

Appendix D — Order Of The United States District Court For The Southern District Of Florida On Defendants' Motions To Dismiss Dated, Decided And Filed February 28, 1994 ..... 95a

Appendix E — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated August 16, 1993 ..... 128a

Appendix F — Second Omnibus Order Of The United States District Court For The Southern District Of Florida Dated And Decided August 19, 1992 ..... 143a

Appendix G — Omnibus Order Of The United States District Court For The Southern District Of Florida Dated And Decided March 5, 1992 .... 164a

Appendices

Page

Appendix H — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed September 15, 1999 ..... 175a

Appendix I — Relevant Statutes 177a

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is found at Appendix ("App.") A to this Petition and is reported at *Tamiami Partners v. Miccosukee Tribe of Indians*, 177 F.3d 1212 (11th Cir. 1999).

Rehearing and Rehearing En Banc was denied on September 15, 1999 and that decision is found at App. H. The Opinion of the United States District Court For The Southern District Of Florida is Found in App. B. The other two related Eleventh Circuit Opinions are found in: App. C reported at *Tamiami Partners v. Miccosukee Tribe of Indians,* 63 F.3d 1030 (11th Cir. 1995), and App. E reported at *Tamiami Partners v. Miccosukee Tribe,* 999 F.2d 503 (11th Cir. 1993). The district court opinions are found in: App. D, and *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, et al.,* 898 F. Supp. 1549 (S.D. Fla. 1994); App. F, and *Tamiami Partners, Ltd., v. Miccosukee Tribe of Indians of Florida,* 803 F. Supp. 401 (S.D. Fla. 1992); and App. G, and *Tamiami Partners, Ltd., v. Miccosukee Tribe of Indians of Florida*, 788 F. Supp. 566 (S.D. Fla. 1992).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 7, 1999.

Rehearing and Rehearing En Banc was denied on September 15, 1999.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, the relevant portions of which can be found at App. I.

STATEMENT OF THE CASE

A. Course of Proceedings, Disposition in Court Below

1. *General Background*

This action arose from a dispute between the Miccosukee Tribe of Indians of Florida ("Tribe"), and Tamiami Partners, Ltd. ("TPL") regarding provisions in a Management and Economic Development Agreement ("Agreement and/or Contract") between the Tribe and TPL.

TPL's Second Amended Complaint, which is the subject of the Eleventh Circuit's panel opinion in this case, is in fact, the fifth complaint filed by TPL (verified complaint, supplemental complaint, amended complaint, and Second Amended Complaint in Case No. 92-489-CIV-Highsmith; and a Complaint in a separate case, Case No. 92-707-CIV-Marcus). The Eleventh Circuit has issued three opinions in this dispute, including the one which is the subject of this Petition for Certiorari.

Before the litigation in federal court began, TPL requested arbitration of the Tribe's notice to terminate the Agreement for breaches by TPL; The Tribe filed claims in Miccosukee Tribal Court, and that court ordered arbitration of the disputes. *Tamiami Partners v. Miccosukee Tribe*, 999 F.2d 503, 505 (11th Cir. 1993) ("*Tamiami I*"). (App. at 131a). However, TPL rejected the Tribal Court's

order by challenging the tribal court's jurisdiction in an amended complaint in federal court. (R2: D.E. 110). The tribal court stayed the arbitration until the federal court determined its jurisdiction. *See Tamiami Partners v. Miccosukee Tribe*, 63 F.3d 1030, 1044 (11th Cir. 1995) ("*Tamiami II*"). (App. C).

Notwithstanding the tribal court stay of the arbitration which the tribal court itself had ordered, two of the three arbitrators went forward with a "hearing" and issued a "decision." (R: D.E. 213, Ex. B). The Tribe's arbitrator obeyed the tribal court and refrained from participating in the *ex parte* proceedings; he filed a dissent, *Tamiami II*, 63 F.3d 1044, n.46, in which he stated that the final *ex-parte* hearing by the two arbitrators violated the Florida Arbitration Code and the AAA Commercial Arbitration Rules, and that Florida law provided that a court which orders arbitration has the authority to stay the arbitration. (R3: D.E. 213, Ex. B, dissent at p. 2-3). The validity of the arbitration panel's "award," decided solely upon TPL's version of the "facts," has never been litigated.

2. *Summary of Eleventh Circuit decisions in this dispute*

In the first appeal, *Tamiami I* (App. E), the Eleventh Circuit found that the court lacked subject matter jurisdiction over TPL's claims, noting that even a parties' alleged consent could not expand the jurisdiction of the federal court. The panel in *Tamiami I* relied on *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 18 n.17 (1951) for the principle that consent of the parties cannot expand federal jurisdiction "because it would allow federal courts to become the common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate

in those courts." App. at 140a. The panel decision in *Tamiami I* stated that consent to be sued, even in a particular court, does not alone confer jurisdiction on that Court if it would not otherwise have jurisdiction. *Id.* The Court found that ". . . this state law breach of contract claim is not appropriate for federal court jurisdiction." *Id.*

The Eleventh Circuit further stated: "TPL's mere assertion that the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, without alleging facts necessary to support a federal question, fails to give the district court subject matter jurisdiction." App. at 140a. *Citing* to *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985), the panel in *Tamiami I* stated that "to invoke a federal court's jurisdiction under § 1331, TPL must have asserted a claim 'arising under' federal law." App. at 140a-141a. The Eleventh Circuit remanded to the district court with directions that the district court dismiss the action unless one of the parties filed a complaint or pleading which property alleged jurisdiction. The panel stated that although neither the Complaint nor Supplemental Complaint had met the standard for federal court jurisdiction, there was evidence in the record which suggested a basis for district court jurisdiction. App. at 141a.

In the second appeal, the Eleventh Circuit dismissed TPL's "first claim" in the Amended Complaint on grounds of sovereign immunity, interpreting TPL's claim as a breach of contract claim for which the Tribe had not waived sovereign immunity. *Tamiami II*, App. at 81a. TPL's "second claim," that the Tribe through its gaming agencies refused to issue licenses, failed because the panel in *Tamiami II* found that IGRA did not provide a private cause of action for TPL. App. at 88a-89a. The "third claim" in

Tamiami II, against the individual defendants, was not dismissed, based on the potential for invoking the *Ex parte Young*[1] doctrine. App. at 93a-94a. The panel in *Tamiami II* noted, however, that "Tamiami has pointed to nothing in IGRA's language that would give it the right to bring this claim against the individual defendants." App. at 82a and 83a n.58, citing to *Davids v. Coyhis*, 869 F. Supp. 1401, 1420 (E.D. Wis. 1994). The panel assumed that TPL was arguing there was an implied right of action. App. at 83a n.56 and 94a n.72.

Subsequently, TPL filed the fifth Complaint in this litigation, styled as the Second Amended Complaint. (R3: D.E. 213) and the decision in this third appeal, *Tamiami Partners v. Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999) (hereinafter "the panel decision" or "*Tamiami III*") (App. A), is the subject of this request for certiorari review. The panel in *Tamiami III* found that the district court had subject matter jurisdiction over the Second Amended Complaint because the first three counts presented "more than a mere dispute concerning a contract or an agreement to arbitrate." *Tamiami III*, App. at 21a-22a. The panel decision found that the district court had subject matter jurisdiction because:

> each of these counts — at least in part — concerns the arbitration of Tamiami's Claims that the Tribe had an obligation under the Agreement to process the gaming license applications of Tamiami and its key employees in good faith and that the Tribe breached its obligation when it rejected these license applications for the purpose of taking over MIB.

App. at 21a. The panel decision found that the portions of the first three counts not relating to gaming licenses were within

1. *Ex parte Young*, 209 U.S. 123 (1908)

the supplemental jurisdiction of the district court and that the last three claims were within the court's supplemental jurisdiction. App. at 22a.

With regard to the issue of sovereign immunity, the panel affirmed the district court on counts: one (a) (read by the panel decision as requesting a declaration that TPL properly invoked arbitration); two (enforcement of an arbitration award); and three (request to compel further arbitration). *Tamiami III*, App. at 27a and n.14. The panel decision reversed the district court as to counts one (b), and four through six against the individual defendants and to the extent they applied to the Tribe. App. at 28a.

The panel denied the Tribe's request to take pendent appellate jurisdiction of the Tribe's argument that TPL's Second Amended Complaint failed to state a claim for relief, leaving this issue open for later resolution. App. at 19a-20a. The panel also declined to review the Tribe's argument that TPL had waived arbitration claims by filing the federal lawsuit, stating that this claim of waiver was an affirmative defense. App. at 16a n.5. The Eleventh Circuit denied the Tribe's petition for panel rehearing and rehearing en banc; TPL did not request rehearing or rehearing *en banc* of the panel's decision. App. at 175a-176a.

B. *Statement of Facts* [2]

The Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe, was organized under the Indian

2. The Statement of Facts is based on arguments, limited hearings, pleadings and attachments to pleadings and is set forth in order to give this Court an overview of the "facts." The panel in *Tamiami III* based its facts on the two previous panel decisions and on the allegations of TPL's complaint. These allegations were accepted as true only for purposes of reviewing issues arising from the motion to dismiss. *See, e.g., Tamiami III, supra*, App. at 3a n.2.

Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* with a Constitution and by-laws approved by the United States pursuant to the Act. 25 U.S.C. § 476 (R2: D.E. 61, Ex. A at p. 1-2). On September 25, 1985, the Miccosukee Tribe adopted a resolution to govern the licensing and conditions of tribal bingo and has amended that ordinance from time to time. (R2: D.E. 61, Ex. A at p. 2).

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, to define the powers of Indian tribes in conducting and regulating gaming on Indian lands. (*Id.*). IGRA established a regulatory scheme to

> Provide a statutory basis for the regulation of gaming by an Indian Tribe adequate to shield such gaming from organized crime and other corrupting influences, to ensure that the Indian Tribe is the primary beneficiary of the gaming operation and to ensure that the gaming is conducted fairly and honestly by both the operator and players in part to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702(2); App. at 178a.

The Act authorizes Indian tribes to enter into management agreements for the operation and management of "Class II" gaming and a review of 25 U.S.C. § 2711 clearly shows that the review is for the benefit of the tribes. App. at 188a-193a. IGRA also requires tribes to conduct background investigations and issue licenses, which are reviewed by the National Indian Gaming Commission. 25 U.S.C. § 2710(b) and App. at 179a-188a.

On April 7, 1989, the Tribe and Tamiami Development Corp. ("TDC") entered into the Agreement, which is the subject of this litigation, for the purpose of operating a Class II gaming enterprise pursuant to the IGRA. Later, TDC assigned its rights to TPL and the facility opened in September 1990. *Tamiami III*, App. at 3a-5a. Article 12 of the Agreement provided that all disputes, controversies and/or claims "arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . ." App. at 4a. Article 23 of the Agreement waived immunity from a suit brought by TDC either to compel arbitration under Article 12 or to enforce an arbitration award. Article 23 provides for jurisdiction in federal court to enforce the terms of the Agreement. Article 23 reads as follows:

> The [Tribe] waives its sovereign immunity from suit as expressly provided in this Article. The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) [the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure by [the Tribe] to abide by the terms of an arbitration award. . . . This waiver of sovereign immunity shall not become effective until [TDC] has given written notice to the Miccosukee Tribal Business Council, detailing the nature of the complaint and the [Tribe] shall have failed after 30 days following such notice to cure such complaint.

App. at 4a.

On January 28, 1992, the Tribe sent TPL a notice of its intent to terminate the Agreement on February 28, 1992 for various contractual violations. *Tamiami III*, App. at 5a. On February 25, 1992, TPL formally demanded arbitration to determine the validity of the Tribe's termination notice, pursuant to Article 12 of the agreement. *Id.* The Tribe filed a "Statement of Claim" in Miccosukee Tribal Court on February 26, 1992, setting forth repeated violations by TPL of the Agreement including dilatory compliance with Tribal ordinances, improper accounting procedures, denial of access to records, unapproved expenditures, noncompetitive buying, injudicious hiring, imprudent business practices, interference with Tribal affairs, deceptive advertising, and "overall conduct as manager so deficient as to jeopardize Tribal revenue and frustrate the purpose of the Enterprise and the Agreement." (R2: D.E. 61, Ex. A); *Tamiami III*, App. at 5a. On February 27, 1992, TPL filed a verified Complaint in the United States District Court, Southern District of Florida. App. at 5a.

On July 16, 1992, the Miccosukee Tribal Court ordered the parties to arbitrate the commercial disputes and reserved jurisdiction. App. at 6a. The arbitration process began and at the same time the Tribe began the licensing process necessary for TPL's employees to comply with the Tribe's licensing requirements. *Id.* After TPL filed its Amended Complaint in September 1993, the Miccosukee Court stayed the arbitration proceedings until a determination was made by the federal court regarding tribal court jurisdiction. App. at 75a-76a. The Tribe had asked for the stay based on TPL's challenge to the tribal court's jurisdiction. *Id.* Two of these arbitrators proceeded in the Tribe's absence, notwithstanding the Miccosukee Court stay of arbitration, finding in favor of TPL on one claim only, which directed reinstatement of one employee. (R3: D.E. 213, Ex. B).

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Tribe requests that the Supreme Court grant certiorari to settle the issues in this litigation which has produced five complaints from TPL (the management contractor) and has resulted in three panel opinions from the Eleventh Circuit Court of Appeals. The case should be reviewed by this Court because it involves important issues of federal jurisdiction and sovereign immunity. The decision also conflicts with established precedent in this Court as well as in other federal courts. Moreover, review of the Eleventh Circuit decisions and the district court decisions in this case themselves indicate conflicting opinions involving jurisdiction and immunity. These conflicts, and the importance of these issues to Indian tribes, call for consideration by the highest court.

The issues in the third appeal to the Eleventh Circuit involved similar issues to those reviewed by the first panel of the Eleventh Circuit which found that the district court lacked subject matter jurisdiction. TPL has attempted numerous times to style its contract claims as something other than state contract claims. However, notwithstanding five attempts at styling the claims, TPL has failed to plead a federal cause of action. Simply citing to a federal statute does not provide the federal courts with subject matter jurisdiction if that statute does not provide a private cause of action in favor of the party asserting it.

Established federal law does not confer jurisdiction over licensing disputes between management contractors and tribes, and the statutory scheme relied upon by the panel in *Tamiami III* provides neither standing to TPL nor any rights of review by federal courts. The panel interpreted TPL's

Second Amended Complaint as presenting more than a contract dispute or agreement to arbitrate. The panel stated: "[e]ach of these counts — at least in part — concerns the arbitration of Tamiami's claims that the Tribe had an obligation under the agreement to process the gaming license applications of Tamiami and its key employees in good faith . . ." *Tamiami III*, 177 F.3d at 1222; App. at 21a. However, IGRA does not provide a right of action to a management contractors over licensing disputes and no provision of IGRA, nor any language in the legislative history of IGRA, provides the federal district court with jurisdiction over these claims. *See, e.g., Tamiami v. Miccosukee*, 803 F. Supp. 401 (S.D. Fla. 1992) (opinion below stating that in enacting IGRA Congress made no provision for suits by management contractors to challenge a Tribe's licensing procedures). *Id.* at 407; App. at 158a.

The panel decision in *Tamiami III* incorrectly provided the management contractor a cause of action in federal court under IGRA. The panel decision interpreted a simple Agreement between the Tribe and TPL as including within the Agreement the provisions of IGRA, and then referred to the Federal Arbitration Act, which cannot provide jurisdiction, as "empowering" the federal district courts to arbitrate the contract claim. Thus, the panel's decision confers jurisdiction in federal courts over every dispute involving gaming management contracts with Indian tribes. The decision in *Tamiami III* will force Indian tribes into litigation over all claims by management contractors, claims for which there is no private right of action, and over which federal courts do not have subject matter jurisdiction. The panel decision conflicts with Supreme Court precedent, other appellate precedent and is inconsistent with its own Eleventh Circuit and district court decisions in this case.

In addition, the implied waiver of sovereign immunity by the panel in *Tamiami III* was improper. The Tribe did not

waive sovereign immunity to any claims under IGRA but had simply waived sovereign immunity to arbitration under the Agreement. Previously, the district court in this case had properly held that the Tribe's "narrow waiver of sovereign immunity did not constitute consent to federal court suits challenging its licensing process." *Tamiami v. Miccosukee Tribe*, 803 F. Supp. at 409; App. at 159a-162a. The panel decision, which grafted a waiver of IGRA claims into the limited waiver by the Tribe for specific contractual terms, conflicts with long-standing principles of tribal sovereignty which require waivers of Tribal sovereign immunity to be express and to be strictly construed. The provision of the Agreement, Article 23, where the Tribe agreed to the limited waiver of immunity does not refer to IGRA and waives immunity only in two very narrow specific instances involving the contract.

Because these issues of subject matter jurisdiction and sovereignty are important issues in Indian law, and because the decision conflicts with established precedent in federal courts as well as established in Supreme Court precedent, this Court should grant the Tribe's Petition for Writ of Certiorari and review these issues.

I.

THE ELEVENTH CIRCUIT PANEL ERRED IN CONCLUDING THAT THERE WAS SUBJECT MATTER JURISDICTION FOR TPL'S ARBITRATION CLAIMS AGAINST THE TRIBE UNDER IGRA.

IGRA does not provide a private right of action for a contractor, such as TPL, to sue tribes over licensing disputes. To the contrary, IGRA established an administrative review

solely to protect tribal interests and nothing in the legislative history states otherwise. The panel decision in *Tamiami III* found that the first three counts of TPL's complaint stated a federal question insofar as they related to the Tribe's rejection of gaming license applications and that the portions of these counts that did not relate to gaming licenses, were within the supplemental jurisdiction of the district court. *Tamiami III*, 177 F.3d at 1223; App. at 22a-23a. The panel's attempt to designate TPL's claims in the Second Amended Complaint as IGRA claims by styling them "licensing disputes" does not confer subject matter jurisdiction where none exists.

The panel decision turns IGRA on its head and fails to address the Tribe's contention that, in enacting IGRA, Congress made no provision for suits by management contractors such as *Tamiami* to challenge a Tribe's licensing procedures. The panel decision in *Tamiami III* effectively confers subject matter jurisdiction in federal courts for simple state-court contract disputes. The jurisdiction of federal courts is limited to the jurisdiction which Congress has prescribed, *Baggett v. First National Bank of Gainesville*, 117 F.3d 1342 (11th Cir. 1997). Mere assertion that a private right of action exists under IGRA does not confer jurisdiction on the federal court. *See Groundhog v. Keller*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). TPL has not met its burden of alleging jurisdiction other than by mere conclusory reliance on IGRA.

Moreover, the Eleventh Circuit panel decision does not specify what provision of IGRA confers subject matter jurisdiction on the district court for claims against tribes by

management contractors, nor where in the legislative history of IGRA there is an implied right of action against the Tribe by a management contractor. And indeed, no such congressional intent is present in IGRA. There must be clear evidence of intent to create a private right of action. *See Baggett, supra*, 117 F.3d at 1344. IGRA does not provide such a right of action. *In re United States ex rel. Hall*, 825 F. Supp. 1422, 1427 (D. Minn. 1993), *aff'd*, 27 F.3d 572 (8th Cir. 1994) (unpublished), *cert. denied*, 513 U.S. 1155 (1995) (no provision of IGRA confers standing on private litigants to seek monetary relief); *Jimi Development Corp. v. Ute Mountain Indian Tribe*, 930 F. Supp. 493 (D. Colo. 1996) (even if contracts between management contractors and tribe were management contracts for purposes of IGRA, no private cause of action). In *Whiteco Metrocom Div. of Whiteco Industries, Inc. v. Yankton Sioux Tribe*, 902 F. Supp. 199 (D.S.D. 1995), the court found that federal question jurisdiction did not exist for a contract dispute under IGRA because IGRA does not create a private right of action for individuals. *Id.* at 202. The panel decision in Tamiami III conflicts with decisions of federal courts which have found that IGRA does not provide a private right of action.

Tamiami III found that the "first three counts of Tamiami's Complaint state a federal question insofar as they relate to the Tribe's rejection of gaming license applications." There is no congressional intent present in IGRA which would provide a right of action to TPL over the claims in its Second Amended Complaint, nor is there any language in the legislative history to indicate an implied right of action. Under the Supreme Court's analysis in *Cort v. Ash*, 422 U.S. 66 (1975), to find an implied right of action the Court must first determine whether Plaintiff is one for whose "especial" benefit Congress enacted the statute. *Cort*, 422 U.S. at 78.

Second, the court must determine whether there is any intention, explicit or implicit, of legislative intent to create or deny a private remedy. *Id.* Then the Court must consider whether implying a private remedy is consistent with the underlying purposes of the legislative scheme. Lastly, the Court must determine whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based on federal law. Id. An analysis of all four *Cort* factors shows that IGRA does not provide management contractors with a private right of action.

The even more restricted analysis later set forth by the Supreme Court in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), which requires the federal courts to determine solely whether Congress intended to create the private right of action being asserted, clearly shows no private right of action for management contractors under IGRA. IGRA was enacted to promote tribal economic prosperity, tribal self-sufficiency and strong tribal governments. 25 U.S.C. § 2701(4). IGRA was enacted for the benefit of Indian tribes. The goal of IGRA was to give tribes the exclusive right to regulate gaming on Indian lands. 25 U.S.C. § 2701(5). The Act also provided a remedial scheme for gaming compacts between tribes and states. 25 U.S.C. § 2710. This regulatory scheme provided by IGRA was intended to protect tribes' pre-existing rights, *see California v. Cabazon*, 480 U.S. 202 (1987), but there is no provision in the scheme for a private right of action for management contractors to seek review of the Tribe's decisions on gaming licenses.

IGRA established a regulatory scheme to shield gaming from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the

gaming operation and to ensure that the gaming is conducted fairly and honestly by both the operator and players in order to protect tribal revenues. 25 U.S.C. § 2702(2). To this end, IGRA requires tribes to conduct background investigations and issue licenses, which are reviewed by the National Indian Gaming Commission ("NIGC"), 25 U.S.C. § 2710. The review by NIGC is clearly for the benefit of the tribes and does not provide any standing to management contractors.

Section 2711 of IGRA authorizes Indian tribes to enter into management agreements for the operation and management of gaming and imposes substantial conditions, for the benefit of the tribes, upon that contract. Clearly, there is no Congressional intent in the statutory language of § 2711, nor in any other provision of IGRA, which demonstrates an intent to provide a private right of action to management contractors against Indian tribes.

Nor is there any language in the legislative history which could be interpreted to provide a private right of action for management contractors against tribes. TPL, therefore, is not the proper party to bring a suit under this provision of IGRA. *See Wilderness Society v. Alcock*, 83 F.3d 386 (11th Cir. 1986). The legislative history of IGRA discusses the governmental interests of the tribes and the benefits to tribes of negotiations with states for gaming. *See* S. Rep. 100 Cong., No. 100-446, *reprinted in*, 1988 U.S.C.C.A.N. 3071, 3083-84. However, neither the panel, nor TPL, have cited below to any legislative history discussing the interests or rights of management contractors and the Tribe has not found any such provision in favor of management contractors. TPL and the panel decision's reliance on IGRA fails to satisfy the first and second factors in *Cort*. TPL is not a member of the class for whose "especial" benefit the

statute was created and there is no intention of legislative intent to create such a remedy. Under *Touche Ross*, *supra*, the reliance on IGRA fails for lack of a right of action.

The implication of a remedy for management contractors against tribes goes against the purpose of the statute, as discussed above. The statute was enacted for the benefit of Indian tribes. Moreover, this case is a pure contract dispute over which a panel of the Eleventh Circuit originally determined there was no jurisdiction. *See Tamiami I*, 999 F.2d at 508; App. at 139a-142a. The language in the panel decision, in *Tamiami III* shows that the issues here are nothing more than a contract dispute: "*Each of these counts* — at least in part — concerns the arbitration of Tamiami's claims that the *Tribe had an obligation under the Agreement* to process the gaming license applications . . . and that the Tribe *breached* its *obligation* when it rejected these license applications, ..." *Tamiami III* at 1223; App. at 21a (emphasis supplied). Thus, under the third and fourth *Cort* factor, if these last two factors were necessary, this contract action, traditionally relegated to state courts, fails.

There is no colorable claim of subject matter jurisdiction, express or implied, under IGRA. As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear, *see Touche Ross & Co. v. Redington*, *supra*, 442 U.S. at 568, and there is no reasonable inference proposed either by the panel decision or by TPL below which would give the district court subject matter jurisdiction.

The Eleventh Circuit should have dismissed the case for lack of subject matter jurisdiction. Instead, the court allowed

for the assertion of an IGRA claim where there is no colorable argument of a private right of action and declined to take pendent appellate jurisdiction on the Tribe's argument under 12(b)(6) for failure to state a claim under IGRA. However, the issue of whether IGRA provides a private right of action required dismissal *both* for subject matter jurisdiction, and for failure to state a claim. *See Salvador v. Bell*, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd sub nom., Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986) (no private right of action under statute existed; the court dismissed the complaint for lack of subject matter jurisdiction *and* for failure to state a claim); *see also Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430 (W.D. Okla. 1992) (dismissal for lack of subject matter jurisdiction where no private right of action exists); *but see Platzer v. Sloan-Kettering Inst. for Cancer Research*, 787 F. Supp. 360 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1086, *cert denied*, 507 U.S. 1006 (1993) (court acknowledged that other courts have held implied right of action to be issue of subject matter jurisdiction but decided that the case should be dismissed for failure to state a claim).

Although the Eleventh Circuit did not address the issue of failure to state a claim, there is no theory over which Plaintiff could prevail on a federal claim and the Eleventh Circuit should have dismissed the case. IGRA is completely *devoid* of any indication, express or implied, that Congress intended to give any private right of action to management contractors. The Tribe should not be forced into further litigation, when the issue of lack of right of action is plain on the face of IGRA and its legislative history.

The complaint reviewed by the panel here is merely a veiled attempt to manufacture federal jurisdiction where none exists. *Cf. Nicholson v. Hooters*, 136 F.3d 1287 (11th Cir. 1998). Simply including "IGRA" in what are essentially the

same contract claims for which the Eleventh Circuit in *Tamiami I* found no jurisdiction, does not convert the claims in the Second Amended Complaint, which is the subject of this Petition for Certiorari review, into federal claims. The request for arbitration and to "enforce" the so-called "arbitration" award was made and rejected by the first panel of the Eleventh Circuit and the complaint requesting arbitration of the licensing disputes was dismissed and not appealed by TPL. The claims which the panel reviewed in *Tamiami III* are the same exact claims which were the basis of failed attempts in other complaints. Merely asserting a baseless claim under a federal statute for which Congress clearly did not provide a private cause of action, should not provide the management contractors with a forum in federal court; to do so turns federal jurisdiction on its head. The panel decision's expansive interpretation of federal jurisdiction reads a right of action into a statute where there is no such evidence of congressional intent. In this case, the management contractor has filed five Complaints and the Tribe has been forced to litigate three times in the Eleventh Circuit even though there is no provision, express or implied which would give management contractors a right of action.

This is not the type of situation where an argument exists that TPL can recover under its complaint if IGRA is given one construction and defeated if IGRA is given another construction. In this case, there is no theory proposed which could conceivably provide a right of action for TPL under IGRA and it conflicts with Supreme Court precedent in *Touche Ross, supra* and *Cort*. The panel's decision has the effect of elevating every state court contractual dispute between a management contractor and an Indian tribe to federal court; this is an important issue which merits certiorari review by the Supreme Court.

II.

THE PANEL ERRED IN CONCLUDING THAT THE TRIBE WAIVED SOVEREIGN IMMUNITY TO CLAIMS UNDER IGRA BY THE MANAGEMENT CONTRACTOR AGAINST THE TRIBE.

The panel in *Tamiami III* incorrectly decided that the Tribe waived immunity to counts one[3] (a), two and three of the Complaint. *Tamiami III*, *supra*, 177 F.3d at 1224-25; App. at 27a. As a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity. *See Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751 (1998). The Eleventh Circuit's opinion in *Tamiami III* found that the waiver of sovereign immunity in Article 23 of the Agreement between the Tribe and TDC applied to claims under IGRA. That finding, however, is incorrect. As sovereign entities that predate the establishment of the United States, Indian tribes are immune from suit without their consent. *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997). A waiver of tribal sovereign immunity must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *see also Florida Paraplegic v. Miccosukee*, 166 F.3d 1126, 1130 (11th Cir. 1999). In conducting the licensing process the Tribe was acting as a government and is therefore shielded by sovereign immunity. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46 (1982).

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3. The Eleventh Circuit did not find, nor could they, that IGRA abrogated the Tribe's sovereign immunity for these contract arbitration claims. *See Florida v. Seminole Tribe of Fla*, 181 F.3d 1237, 1242 (11th Cir. 1999) (finding that Congress abrogated tribal immunity in IGRA "only in the narrow circumstances in which a tribe conducts class III gaming in violation of an existing Tribal-State contract").

The limited waiver in Article 23 applied only to enforce the terms of the Agreement if the owner failed to participate in arbitration proceedings under Article 12, or if the owner failed to abide by the terms of the Arbitration award. *See* text: App. at 4a and Petition for Writ of Certiorari, *supra* at 8. The waiver of sovereign immunity for claims in the Agreement was not a waiver to any claims under the IGRA. This waiver could not be construed as a waiver for any claims under IGRA. It refers specifically to the Agreement and consents to jurisdiction to enforce the terms of the agreement in federal court if one of two events occur: (1) the Tribe fails to participate in arbitration proceedings invoked as provided in Article 12; or (2) failure of the Tribe to abide by the terms of the arbitration award. The waiver refers to Article 12 (clearly a contract provision) and to enforcement of the arbitration award (solely under the contract) *Tamiami III*, 177 F.3d at 1215; App. at 4a. Thus, no waiver of sovereign immunity for IGRA claims against the Tribe by the management contractor can be found to exist even if such claims under IGRA were proper by a management contractor against a tribe.

The panel opinion in *Tamiami III*, refers to the waiver in the contract and to the contract terms referencing arbitration and then incorrectly concludes that the Tribe waived sovereign immunity for all claims related to IGRA's licensing authority. However, the panel completely ignores the plain fact that this waiver in Article 23 of the Agreement related only to the Agreement and, indeed, to very specific terms. Thus, even if TPL had a private right of action under IGRA, no waiver of sovereign immunity with regard to IGRA claims was made by the Tribe. By reaching over to IGRA, finding a non-existent right of action by management contractors over licensing disputes, by incorporating the

remainder of the claims in counts one to three as "supplemental claims", and then broadly interpreting the very specific waiver under the Agreement, to cover Counts I-III, the Eleventh Circuit has swept away precedent regarding strict interpretation of waivers of immunity. *See Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58. Such relief is inconsistent with established precedent even if TPL had properly stated a private right of action under IGRA. *See Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 437-38 (D.S.D. 1995), *appeal dismissed*, 89 F.3d 840 (8th Cir. 1996)

A waiver for IGRA claims cannot be implied from the limited contractual waiver at issue here. Thus, the panel's conclusion that the Tribe's limited waiver of sovereign immunity in Article 23 was a waiver for "IGRA claims" is contrary to Supreme Court and other established precedent and should be reviewed by this Court.

CONCLUSION

Wherefore, for the reasons stated above, the Tribe requests that this Court grant Certiorari to review the panel decision in *Tamiami III* which erroneously decided important issues of federal subject matter jurisdiction and tribal sovereign immunity.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 7, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5262

D.C. Docket No. 92-CV-489-SH

TAMIAMI PARTNERS, LTD. by and through TAMIAMI DEVELOPMENT CORP., its general partner,

Plaintiff-Appellee,

versus

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; BILLY CYPRESS; JASPER NELSON; JIMMIE BERT; MAX BILLIE; HENRY BERT; and DEXTER LEHTINEN,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 7, 1999)

Before TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

Appendix A

TJOFLAT, Circuit Judge:

This case, which is making its third appearance before our court,[1] is the result of a protracted contractual dispute between the Miccosukee Tribe of Indians of Florida ("the Tribe") and Tamiami Partners, Ltd. ("Tamiami"). The most recent incarnation of this dispute is Tamiami's second amended complaint against the Tribe as well as against the Tribe's attorney and several officers of the Tribe's Business Council and Gaming Agency (collectively, the "individual defendants"). In the district court, all of the defendants filed motions to dismiss Tamiami's second amended complaint on the following grounds: lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. The defendants bring this interlocutory appeal from the district court's order denying their motions. Because of this procedural posture, we consider only the issues of subject matter jurisdiction and sovereign immunity. With one minor exception, *see infra* part III.B., we affirm the district court's order on these issues with respect to the Tribe. As to the individual defendants, however, we hold that the doctrine

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1. The dispute between these parties has not been confined solely to federal court. *See, e.g., Cypress v. Tamiami Partners, Ltd.*, 662 So. 2d 1292 (Fla. 3d DCA 1995) (quashing discovery order on basis of sovereign immunity); *Mandel v. Miccosukee Tribal Gaming Agency*, No. CV 93-18, 22 Indian L. Rep. 6148 (Miccosukee Tribal Ct. Jan. 31, 1994) (affirming denial of gaming license applications by Gaming Agency); *In re Conservatorship for Miccosukee Indian Bingo*, No. CV 93-11 (Miccosukee Tribal Ct. Apr. 13, 1993) (enforcing Gaming Agency order appointing conservator); *Miccosukee Tribe of Indians v. Tamiami Partners, Ltd.*, No. CV 92-07 (Miccosukee Tribal Ct. July 16, 1992) (directing parties to arbitrate their disputes).

of *Ex parte Young* does not allow Tamiami to defeat their claims of sovereign immunity.

I.

A.

Because our prior opinions discuss the facts and initial procedural history of this case in detail, we provide only a summary here.[2] On April 7, 1989, the Tribe entered into a Management and Economic Development Agreement (the "Agreement") with Tamiami Development Corporation ("TDC") to operate a bingo gaming facility on Tribal lands under a gaming scheme authorized by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994), and a 1985 tribal ordinance. The Agreement had a seven-year term and was renewable by TDC, at its option, for an additional three years. In exchange for forty percent of the facility's monthly "net revenues," TDC agreed to purchase a parcel of real estate (outside the Miccosukee reservation), convey the parcel to the United States in trust for the Tribe, and then design, construct, and manage a bingo facility on that parcel.

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2. Most of the facts we recite in part I are drawn from the record in this case and from our prior opinions. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir. 1993). We occasionally draw upon the allegations in Tamiami's second amended complaint, which we accept as true in reviewing the defendants' motions to dismiss. *See Jackson v. Okaloosa County*, 21 F.3d 1531, 1534 (11th Cir. 1994).

Appendix A

Two provisions of the Agreement are particularly relevant here. Article 12 provides that "[a]ll disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . . ." Under Article 23 of the Agreement, the Tribe waived its common-law immunity from a suit brought by TDC either to compel arbitration under Article 12 or to enforce an arbitration award. Article 23 states:

> The [Tribe] waives its sovereign immunity from suit as expressly provided in this Article. The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) [the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure by [the Tribe] to abide by the terms of an arbitration award. . . . This waiver of sovereign immunity shall not become effective until [TDC] has given written notice to the Miccosukee Tribal Business Council, detailing the nature of the complaint and the [Tribe] shall have failed after 30 days following such notice to cure such complaint.

After the Agreement was approved by a designee of the Secretary of the Interior, TDC purchased the parcel and began to construct the bingo facility. On January 23, 1990, with the Secretary's approval, the parties effected a novation of the Agreement in order to substitute Tamiami — a Florida limited partnership of which TDC was the general partner

— for TDC. Thereafter, Tamiami completed the facility and began operating it as Miccosukee Indian Bingo ("MIB") in September 1990. On August 9, 1991, the Tribe adopted an ordinance establishing a Tribal Gaming Agency to oversee the registration and licensing of the managers and key employees of its gaming enterprises, including the facility managed by Tamiami. Under this ordinance, the denial of a license would result in termination of employment and eviction from the gaming facility.

During the first sixteen months of MIB's operation, the Tribe made two separate offers to purchase Tamiami's interest in the facility. The highest offer was for an amount equal to Tamiami's initial investment in the facility. Tamiami rejected both offers. On January 28, 1992, the Tribe notified Tamiami by letter that the Agreement had been "terminated by action of the [Tribe's] Business Council . . . effective 30 days from the date hereof, because of repeated and flagrant violations of the letter and spirit of that Agreement." On February 25, pursuant to Article 12 of the Agreement, Tamiami formally demanded arbitration "to determine the validity of the Tribe's purported notice of termination." The Tribe responded by filing a "Statement of Claim" in Miccosukee Tribal Court to obtain a declaration that the Agreement had been terminated. On February 27, Tamiami initiated this lawsuit by filing its original verified complaint against the Tribe in the United States District Court for the Southern District of Florida. This complaint sought a declaratory judgment that Article 12 of the Agreement bound the Tribe to settle all disputes by arbitration, as well as an injunction compelling the Tribe to arbitrate the termination

dispute and preventing it from taking control of MIB pending the completion of such arbitration.

On March 5, 1992, the district court issued its first "omnibus order" in the case. As a threshold matter, the court determined that it had subject matter jurisdiction because the case presented the question of Tribal Court power over a non-Indian. It stayed further proceedings in the case, however, pending either the parties' exhaustion of their remedies in the Tribal Court or any action by the Tribe to evict or otherwise impede Tamiami from operating MIB. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 788 F. Supp. 566 (S.D. Fla. 1992).

On July 16, 1992, the Tribal Court issued a ruling that directed the parties to initiate arbitration proceedings in accordance with the Agreement. During that same month, the Tribe denied seventeen license applications that Tamiami employees had submitted to the Tribal Gaming Agency. Tamiami responded by filing a motion asking the district court to enjoin the Tribe from exercising self-help in order to terminate the Agreement. Tamiami alleged in its motion that the Tribe, under the pretext of issuing legitimate license denials, was engaging in self-help in order to prevent Tamiami from operating MIB and thus effectively terminate the Agreement. In its second omnibus order, issued on August 19, the district court addressed this motion. The court found that the Tribe's licensing process was arbitrary and capricious under the Administrative Procedure Act. Nevertheless, the court concluded that Congress, in enacting IGRA, had made no provision for suits by management contractors (such as Tamiami) to challenge a Tribe's

licensing procedures. Moreover, it held that the Tribe's narrow waiver of sovereign immunity did not constitute consent to federal court suits challenging its licensing process. For these reasons, the court denied Tamiami's motion. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 803 F. Supp. 401 (S.D. Fla. 1992).

On August 21, Tamiami moved the district court for leave to file a "supplemental" complaint and for a preliminary injunction that would compel arbitration of the licensing dispute and prevent the Tribe from using the licensing process to frustrate Tamiami's operation of MIB. The court denied this motion on September 15. Thereafter, Tamiami took interlocutory appeals from the district court's August 19 and September 15 orders.

An arbitration panel eventually was convened on December 17, 1992. On April 13, 1993, while the interlocutory appeals and arbitration were pending, the Tribe took several steps to oust Tamiami from MIB. The Tribal Gaming Agency denied licenses to Tamiami, TDC, and two of TDC's principal officers — Cye Mandel and John Sisto. The Gaming Agency also appointed a conservator to take control of MIB and to operate the facility; the conservator was instructed to pay the Tribe its share of MIB's net revenues and to deposit Tamiami's forty percent share into a trust account at Jefferson National Bank in Miami, Florida. The Tribal Court ratified the conservator's appointment the same day. The Tribal police then forced Mandel and Sisto to leave the MIB premises, the MIB accountant surrendered MIB's financial records to the Tribe, and the Tribe began the process of obtaining control of MIB's bank accounts.

Tamiami immediately returned to the district court seeking an injunction to prevent the Tribe from exercising self-help. In its third omnibus order, issued on April 15, the district court found that the Tribal Court had exceeded its jurisdiction in ratifying the conservator's appointment. The court also concluded that the Tribe had exceeded its sovereign powers in rejecting the license applications of Tamiami, TDC, Mandel, and Sisto. In its view, these rejections were simply an attempt to circumvent the ongoing arbitration and to terminate the Agreement. Accordingly, the court declared that all of the Tribe's April 13 actions were void and ordered the parties to return to the status quo ante of April 12. The court certified its order under 28 U.S.C. § 1292(b) (1994) to allow the Tribe to appeal. We permitted the Tribe's appeal and consolidated it with Tamiami's two pending interlocutory appeals.

On August 16, 1993, a panel of this court decided these three appeals. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir. 1993) [hereinafter *Tamiami I*]. Addressing the subject matter jurisdiction of the district court, the panel applied the "well-pleaded complaint rule"[3] and held that Tamiami's complaint failed to state a federal question within the meaning of 28 U.S.C. § 1331 (1994). *See Tamiami I*, 999 F.2d at 506-07. The panel recognized that "[t]he right to be protected against an unlawful exercise of tribal court judicial power is . . . a claim arising under federal law," *id.* at 507, but stated that

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3. Under the well-pleaded complaint rule, a case does not raise an issue of federal law "unless a federal question is presented on the face of the plaintiff's complaint." *Kemp v. International Bus. Machs. Corp.*, 109 F.3d 708, 712 (11th Cir. 1997).

Tamiami's complaint failed to assert such a right. Instead, the complaint merely invoked section 1331 and then "present[ed] facts establishing a breach of contract claim." *Id.* Accordingly, the panel reversed the district court's third omnibus order and remanded the case with the following instructions:

> Because we are now aware of facts which suggest that the district court could have [subject matter] jurisdiction if the case arose today, we remand the case to the district court with directions that the district court dismiss this action unless one of the present parties files a complaint or other pleading which properly alleges jurisdiction.

Id. at 508.

B.

On remand, Tamiami accepted the panel's invitation by filing an amended complaint on September 14, 1993. This complaint essentially presented three claims.[4] First, Tamiami asserted a breach of contract claim against the Tribe. It

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4. This court gleaned these three claims from a fair reading of the complaint. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1046-47 (11th Cir. 1995). In addition to these claims, Tamiami further contended that the Miccosukee Tribal Court and its judges had exceeded their jurisdiction and sought to have the Tribal Court's actions of April 13, 1993, declared invalid. Because this court later declared these claims against the Tribal Court and its judges to be moot, *see id.* at 1044, 1046 n.57, we do not discuss them further here.

alleged that the Tribe, operating through its Business Council and Gaming Agency, breached the Agreement by taking control of MIB and ousting Tamiami from the premises. Such actions, according to Tamiami, violated IGRA and exceeded the sovereign powers accorded to the Tribe under federal law. As a remedy for these violations, Tamiami sought an injunction restoring its position as the MIB operator and requiring the Tribe to pay Tamiami its forty percent share of MIB's net revenues.

In its second claim, Tamiami contended that the Tribe, acting through its Gaming Agency, abused the licensing authority conferred by IGRA and its associated regulations by refusing to license Tamiami, TDC, Mandel, and Sisto. Tamiami therefore sought an order declaring that such abuses had occurred and enjoining the Gaming Agency to issue the requested licenses. Tamiami's third claim, which also pertained to the licensing authority conferred by IGRA and its regulations, was brought against individual members of the Tribe's Business Council and Gaming Agency. According to Tamiami, because these individuals were executing the Tribe's plan to assume control of MIB by refusing to license Tamiami's key personnel, they were subject to suit under IGRA in the district court. As to these defendants, Tamiami sought an injunction ordering them to grant the licenses at issue, restore Tamiami to the MIB premises, and turn over its share of the net revenues.

Meanwhile, the arbitration between the parties was proceeding and the arbitration panel had scheduled a final hearing for September 23. On September 15, the Tribe filed a motion in Tribal Court requesting a stay of arbitration

proceedings. The court granted the stay on the following day. On September 21, the arbitration panel concluded that it derived its authority from Article 12 of the Agreement and that the Miccosukee Tribal Court had no jurisdiction to enforce that article. The panel therefore proceeded to hold its final hearing as scheduled, albeit without the participation of the Tribe or its chosen arbitrator. On October 6, a majority of the panel issued a decision in which it found that the Tribe had violated the Agreement by terminating Tamiami's MIB program director after denying his application for a gaming license. The panel awarded Tamiami fees and costs, and gave the Tribe a choice between reinstating Tamiami as manager of MIB or paying Tamiami $9.5 million in satisfaction of the Tribe's obligations under the Agreement.

On October 12, 1993, the Tribe again restructured the management of MIB by terminating the conservator. At the Tribe's direction, the conservator withdrew Tamiami's share of net revenues from the trust account at Jefferson National Bank; he received those funds in the form of a cashier's check for approximately $1,566,000 that was made payable to "Dexter Lehtinen, trustee." Lehtinen, the Tribe's legal counsel, then endorsed the check over to the Tribe for deposit in a separate account at Jefferson National Bank entitled "Miccosukee Indian Bingo Reserve Account." The district court froze this separate account on October 27.

Also on October 12, the defendants filed motions to dismiss Tamiami's amended complaint on the grounds of lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. The district court ruled on these motions on February 28, 1994. *See Tamiami Partners, Ltd.*

v. Miccosukee Tribe of Indians, 898 F.Supp. 1549 (S.D. Fla. 1994). The court began by holding that Tamiami's amended complaint raised a federal question — "namely, whether these defendants exceeded tribal powers in their actions towards [Tamiami]." *Id.* at 1560. Turning to the issue of sovereign immunity, the court concluded that Tamiami's claims against the Tribe and its Business Council and Gaming Agency were barred because the Tribe had not clearly waived its immunity and Congress had not abrogated it. Accordingly, the court dismissed these claims with prejudice. With regard to the individual defendants, however, the court — applying the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) — held that the Tribe's sovereign immunity did not shield the individual defendants given Tamiami's allegation that they had "acted beyond the authority that the Tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes." *Id.* at 1561-62. The court therefore denied the individual defendants' motions to dismiss.

The individual defendants appealed the portion of the district court's order rejecting their claims of tribal sovereign immunity. After the district court entered final judgment on Tamiami's claims against the Tribe and its associated entities, Tamiami appealed that judgment. A second panel of this court consolidated these appeals and issued an opinion on August 16, 1995. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995) [hereinafter *Tamiami II*].

As to the subject matter jurisdiction of the district court, the panel held that each of Tamiami's three claims presented

a federal question. Tamiami's claim that the Tribe had breached the Agreement, according to the panel, was essentially a claim that the Tribe — acting through its Gaming Agency — had violated IGRA and its associated regulations (which the Agreement incorporated) by failing to process Tamiami's license applications in good faith with the sole purpose of taking over MIB. Thus, Tamiami's arguments that IGRA imposed an obligation to process license applications in good faith and that the Tribe violated this obligation presented a federal question. The panel also concluded that Tamiami's second and third claims, which were based directly on IGRA and the regulations, presented federal questions. *See id.* at 1047.

Turning to the issues of sovereign immunity and failure to state a claim, the panel examined Tamiami's first and second claims against the Tribe. It agreed with the district court's conclusion that Tamiami's first claim was barred by the Tribe's sovereign immunity, which Congress had not abrogated and the Tribe had not clearly waived. Although Article 23 of the Agreement did provide a waiver for the limited purposes of compelling the Tribe to arbitrate or enforcing an arbitration award, the panel found that Tamiami's first claim — "simply a breach of contract claim for which it seeks money damages and injunctive relief," *id.* at 1048 — did not seek the type of relief contemplated by that waiver. In footnote 66, which appeared at the end of its discussion of Tamiami's first claim, the panel offered the following comment:

> Tamiami's original complaint sought an order compelling the Tribe to submit to arbitration; its

> amended complaint, however, does not seek that relief. Tamiami remains free, of course, to seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration of any remaining contract disputes.

Id. at 1048 n.66. As to Tamiami's second claim alleging violations of IGRA and the regulations, however, the panel did not agree that it was barred by the Tribe's sovereign immunity. Rather, it "dispose[d] of that claim on the separate ground that, because IGRA provides Tamiami no right of action, Tamiami has failed to state a claim for relief." *Id.* at 1048.

Finally, the panel considered Tamiami's claim against the individual defendants. It found that the district court's denial of the individual defendants' motions to dismiss on the ground of Tribal sovereign immunity was immediately appealable under the *Cohen* collateral order doctrine. *See id.* at 1050; *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949). The panel then proceeded to affirm the district court's ruling, under the doctrine of *Ex parte Young*, that the individual defendants were not shielded by the Tribe's sovereign immunity. It declined to decide, however, whether Tamiami could state a claim for relief against the individual defendants. *See id.* at 1051 & n.72.

C.

On remand, the district court granted Tamiami's motion to file a second amended complaint — the pleading now

before us. This complaint, which Tamiami filed on November 17, 1995, contains six counts and names as defendants the Tribe, individual members of the Tribe's Business Council and Gaming Agency (Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, and Henry Bert), and the Tribe's legal counsel, Dexter Lehtinen. The first count essentially requests two types of declaratory relief: (a) a declaration that all disputes between Tamiami and the Tribe that arise out of or relate to the Agreement — including the licensing dispute — are arbitrable; and (b) a declaration against all of the defendants that the funds in the frozen account belong solely to Tamiami. The second and third counts request a judgment requiring the Tribe to comply with the October 1993 arbitration award and compelling the Tribe to arbitrate certain other disputes arising out of or related to the Agreement.

In the fourth count, Tamiami seeks an injunction against the Tribe in the form of an order directing the individual members of the Business Council and Gaming Agency to rescind their orders of April 13 and October 12, 1993 — which converted Tamiami's share of MIB's net revenues to the Tribe — and return the funds in the frozen account to Tamiami. The fifth count is a conversion claim against Billy Cypress, Chairman of the Tribe, and Dexter Lehtinen. In this count, Tamiami contends that Cypress and Lehtinen caused to be converted to the Tribe certain sums rightfully belonging to Tamiami, including the $1.5 million in the frozen Jefferson National Bank trust account and a $50,000 advance that was in the custody of the conservator as of April 13, 1993. As a result of this conversion, Tamiami requests compensatory damages "in excess of $1.5 million." The sixth count requests that the court order all defendants to make an accounting to

Tamiami for the funds taken from the frozen account and for MIB's revenues since October 1993. In addition, Tamiami seeks a judgment imposing a constructive trust over its forty percent share of MIB's net revenues, the funds in the frozen account, and the $50,000 advance, as well as an order requiring the defendants immediately to pay these sums to Tamiami.

On December 4 and 5, all of the defendants filed motions to dismiss Tamiami's second amended complaint on the following three grounds: lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim.[5] The district court denied these motions in a memorandum opinion and order dated September 27, 1996. In its brief opinion, the court found that the first three counts of Tamiami's complaint were predicated on the arbitration clause of the Agreement. Referring to the *Tamiami II* panel's comments in footnote 66, it concluded that the Eleventh Circuit had contemplated the assertion of such arbitration claims on remand. The court therefore rejected the defendants' arguments as to those claims. Turning to counts four through six, the court found that it had supplemental jurisdiction to consider the state law claims asserted therein. The court also rejected "the individual defendants' invocation of sovereign immunity as to the claims asserted against them, pursuant to its prior analysis under the doctrine of *Ex parte Young*, which was affirmed by the Eleventh Circuit." This appeal followed.

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5. Certain defendants included a fourth ground for dismissal, namely that Tamiami had waived its contractual right to arbitration under the Agreement. This waiver argument, however, is an affirmative defense, *see* Fed. R. Civ. P. 8(c); it is not a ground upon which Tamiami's complaint could be dismissed. Therefore, we do not consider the issue of waiver here.

II.

The defendants urge us to find that the district court erred in rejecting each of the three grounds upon which they based their motions to dismiss. Because this is an interlocutory appeal from the district court's denial of the defendants' motions, however, we must exercise care in determining which of these three issues are presently before us for review.

We have no doubt that the issue of subject matter jurisdiction is before us. As a threshold matter, we have a special obligation to satisfy ourselves not only that we have jurisdiction over this appeal, but also that the district court had jurisdiction over the various counts of Tamiami's complaint. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, __, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998).[6] "[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986) (alterations in original) (quoting *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 832, 80 L. Ed. 1263 (1936)). Thus, it is appropriate for us initially to consider whether the district court erred in finding that it had subject matter jurisdiction over Tamiami's complaint. *Cf. In re Sealed Case*, 131 F.3d 208, 210-12 (D.C. Cir. 1997) (considering issue of subject matter jurisdiction before

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6. This obligation applies to every appeal; it is "inflexible and without exception." *Id.* at __, 118 S. Ct. at 1012 (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1884)).

addressing issue that qualified for interlocutory appeal under collateral order doctrine).

The issue of sovereign immunity is also properly before us. Under 28 U.S.C. § 1291 (1994), we have "jurisdiction of appeals from all final decisions of the district courts . . . , except where a direct review may be had in the Supreme Court." The *Cohen* collateral order doctrine gives a "practical construction" to this final decision rule by permitting appeals "from a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.' " *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S. Ct. 1203, 1208, 131 L. Ed. 2d 60 (1995) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949)). This small category of immediately appealable decisions "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* As the panel recognized in *Tamiami II*, 63 F.3d at 1050, the district court's denial of sovereign immunity to the defendants falls within this category.

Regarding the issue of whether Tamiami has failed to state a claim, the defendants ask us to exercise pendent appellate jurisdiction on the theory that this issue is "inextricably intertwined" with the issue of sovereign immunity.[7] In accordance with the Supreme Court's

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7. The defendants do not — and could not — rely upon either *Cohen* or 28 U.S.C. § 1292 (1994) as a basis for their contention that we have jurisdiction to consider the issue of whether Tamiami has failed to state a claim.

suggestion in *Swint*, 514 U.S. at 51, 115 S. Ct. at 1212, we have previously recognized that pendent appellate jurisdiction over related claims "may be appropriate when a nonappealable decision is 'inextricably intertwined' with an appealable decision or when 'review of the former decision [is] necessary to ensure meaningful review of the latter.' " *United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) (exercising such jurisdiction). In this case, however, a brief overview of the defendants' specific contentions suffices to demonstrate that the issue of whether Tamiami has failed to state a claim is not in fact inextricably intertwined with the issue of sovereign immunity.[8] The defendants argue that Tamiami has failed to state a claim because counts one through three of its complaint rely on certain provisions of IGRA that do not apply to the Agreement and provide no cause of action, and because counts four through six are duplicative prayers for relief that state no claim under either federal or state law. Plainly, these arguments are wholly unrelated to the defendants' contentions that Tamiami's claims against the Tribe do not fall within the Tribe's waiver of sovereign immunity and that the individual defendants are not amenable to suit under the doctrine of *Ex parte Young*. Therefore, we decline to exercise pendent appellate jurisdiction over the issue of

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8. We are aware of, and unimpressed by, the defendants' assertion that the *Tamiami II* panel has inextricably intertwined these issues. According to the defendants, the panel did so by deciding that the individual defendants were amenable to suit under *Ex parte Young* and then refusing to reach the issue of whether Tamiami could state a claim against them. *See Tamiami II*, 63 F.3d at 1051 n.72. If anything, this discussion indicates that the panel did not view these issues as inextricably intertwined.

failure to state a claim; we consider only whether the district court had subject matter jurisdiction and whether the Tribe and the individual defendants were shielded by sovereign immunity.

III.

A.

The issue of whether the district court had subject matter jurisdiction over Tamiami's complaint is a question of law subject to *de novo* review. *See Tamiami I*, 999 F.2d at 506. We begin our review with the defendants' contention that the first three counts of Tamiami's complaint do not state a federal question. *See* 28 U.S.C. § 1331 (1994). According to the defendants, these counts merely address contract and arbitration disputes arising under the Agreement. They argue that such disputes do not raise a federal question and that the statement in Article 23 of the Agreement that the district court "shall have jurisdiction" over the parties cannot change this result.

The defendants are correct in part. It is well-settled that parties cannot create subject matter jurisdiction by agreement. *See Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984). In addition, the mere fact that a dispute concerns a contract or an agreement to arbitrate, without more, does not raise a federal question. *See Tamiami I*, 999 F.2d at 507 (holding that the presentation of facts establishing a breach of contract claim does not state a federal question); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391,

395 (5th Cir. Unit B Feb. 1981)[9] (noting that the Federal Arbitration Act alone is insufficient to confer federal jurisdiction over disputes involving arbitration agreements, and that an independent basis of jurisdiction — such as diversity or a federal question — is required). In this case, however, we find that the first three counts of Tamiami's complaint present more than a mere dispute concerning a contract or an agreement to arbitrate. Each of these counts — at least in part — concerns the arbitration of Tamiami's claims that the Tribe had an obligation under the Agreement to process the gaming license applications of Tamiami and its key employees in good faith, and that the Tribe breached its obligation when it rejected these license applications for the sole purpose of taking over MIB.[10] These very same claims were before this court in *Tamiami II*, albeit in the

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9. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

10. Specifically, one portion of the first count requests a declaration "that disputes between the parties to the Agreement regarding the licensing of [Tamiami] and its principals [are] arbitrable." The second count requests enforcement of the October 1993 arbitration award, which addressed the termination of Tamiami's MIB program director following the denial of his gaming license application by the Tribe. The third count seeks to compel the Tribe to arbitrate certain additional disputes, including Tamiami's claims "that the Tribe breached the Agreement by failing to process the applications of [Tamiami's] managers and key employees in good faith; [and] that the Tribe . . . abused its licensing authority and rejected [Tamiami] applications for the sole purpose of taking over MIB."

context of a direct breach of contract suit against the Tribe. The *Tamiami II* panel concluded that these claims arose under federal law because the Agreement incorporated — by operation of law if not by reference — the provisions of IGRA and its associated regulations regarding licensing procedures. *See Tamiami II*, 63 F.3d at 1047. Because federal law is equally implicated when these claims are presented in the arbitration context,[11] we must follow the *Tamiami II* panel's conclusion here.[12] We hold, therefore, that the first

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11. The Federal Arbitration Act empowers a district court to issue an order compelling arbitration if the court, "save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4 (1994). Thus, it is appropriate for us to "look through" Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question.

12. Rather than looking to *Tamiami II*, the defendants assert that Tamiami's current (second amended) complaint asks for the same relief that was held not to provide a basis for federal question jurisdiction in *Tamiami I*. This assertion is simply incorrect. The original verified complaint that was before the *Tamiami I* panel sought, *inter alia*, an injunction compelling the Tribe to arbitrate the dispute arising from its initial attempt to terminate the Agreement by letter. Because the subsequent licensing dispute between the parties had not yet arisen when the verified complaint was filed, that complaint understandably made no allegations and requested no relief regarding the licensing dispute. It is this licensing dispute — not the earlier termination dispute — that provides a basis for exercising federal question jurisdiction over Tamiami's current complaint.

(Cont'd)

three counts of Tamiami's complaint state a federal question insofar as they relate to the Tribe's rejection of gaming license applications. The portions of these counts that do not relate to gaming licenses are plainly within the supplemental jurisdiction of the district court; the defendants do not contend otherwise.

The defendants do contend, however, that the district court lacked the power to exercise supplemental jurisdiction over counts four through six of Tamiami's complaint. Under 28 U.S.C. § 1367(a) (1994), a district court that has original jurisdiction in a civil action "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." In other words, a district court has the power to exercise supplemental jurisdiction over all claims that "arise out of a common nucleus of operative fact with a substantial federal claim." *Lucero v. Trosch*, 121 F.3d 591, 597 (11th Cir. 1997).

We readily conclude that Tamiami's federal claims regarding the Tribe's gaming license denials are sufficiently substantial to support supplemental jurisdiction. Neither we

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(Cont'd)

We are aware that Tamiami's "supplemental" complaint, which the district court declined to entertain on September 15, 1992, included allegations regarding the Tribe's initial license denials and requested an order compelling the Tribe to arbitrate the licensing dispute. The *Tamiami I* panel, however, had no jurisdiction to consider this version of Tamiami's complaint. *See Tamiami II*, 63 F.3d at 1043 n.44.

nor the defendants have discovered any "prior decisions [that] inescapably render the claims frivolous." *See L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 427 (11th Cir. 1984) (quoting *Jackson v. Stinchcomb*, 635 F.2d 462, 471 (5th Cir. Jan. 1981)). As to whether these substantial federal claims share a common nucleus of operative fact with Tamiami's claims in counts four through six, the defendants offer two reasons why they do not. First, the Tribe and its officials argue that no common nucleus exists because Tamiami's federal claims are against the Tribe while its remaining claims are against the individual defendants. This argument is both factually and legally incorrect. As a factual matter, our discussion of Tamiami's second amended complaint reveals that counts four and six are against both the Tribe and the individual defendants. *See supra* part I.C. In addition, it is clear from section 1367 itself that the parties to the federal and supplemental claims need not be identical in order for supplemental jurisdiction to lie. *See* 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.").

Second, defendant Lehtinen argues that a common nucleus is lacking as to counts five and six because the facts that bear upon the state-law claims asserted in those counts are separate and distinct from the facts that are relevant to the resolution of Tamiami's federal claims. Specifically, Lehtinen asserts that the facts necessary to prove conversion and constructive trust under state law concern the actions of the individual defendants regarding certain funds (such as those in the frozen account), while the facts necessary to the resolution of Tamiami's federal claims concern the

arbitration provisions of the Agreement between Tamiami and the Tribe. Because the success of Tamiami's federal claims does not depend on the success of its state-law claims, he argues, supplemental jurisdiction over the state-law claims is unavailable. We find Lehtinen's conception of supplemental jurisdiction to be unduly narrow. In our view, both Tamiami's federal claims and its claims in counts four through six seek to remedy the injury that Tamiami suffered when the Tribe terminated the Agreement through a series of actions by the individual defendants. In its second amended complaint, Tamiami made a strategic decision to attack this termination in two ways: (1) in the first three counts, Tamiami attacked the Tribe's *method* of terminating the agreement by seeking to arbitrate its federal claim that the Tribe denied its license applications in bad faith in order to take over MIB; and (2) in counts four through six, Tamiami attacked the *result* of this termination by seeking to recover its forty percent share of MIB's net revenues from the Tribe and the individual defendants. This strategic decision, however, did not catalyze some mysterious fissile process that split the sphere of operative facts surrounding the termination dispute into two separate nuclei. Thus, the district court had the power to exercise supplemental jurisdiction over counts four through six of Tamiami's complaint.

B.

We now turn to the district court's ruling that the Tribe's sovereign immunity does not shield the Tribe and the individual defendants from suit. The issue of a sovereign's immunity from suit is a question of law that we review *de novo*. *See Tinney v. Shores*, 77 F.3d 378, 383 (11th Cir. 1996).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978). Tamiami's claims against the Tribe itself are therefore "barred by the doctrine of sovereign immunity unless the Tribe, by the very act of entering into the [Agreement] and engaging in the gaming enterprise, waived its immunity from suit by Tamiami or Congress, by enacting IGRA, abrogated that immunity." *Tamiami II*, 63 F.3d at 1048. Although we concluded in *Tamiami II* that IGRA did not purport to abrogate the sovereign immunity of tribes that engage in bingo gaming, we also found that the Tribe partially waived its immunity in Article 23 of the Agreement. *See id.* The Tribe contends that Tamiami's claims against it in the second amended complaint do not fall within the scope of this waiver.

Under Article 23 of the Agreement, the Tribe waived its immunity from a suit brought by Tamiami to co[illegible] arbitration or to enforce an arbitration award. *See supra* part I.A. (quoting Article 23). To the extent that counts one (b), four, and six of the second amended complaint — which seek, respectively, a declaration that the frozen funds belong to Tamiami, an injunction compelling the return of these funds, and an accounting and the imposition of a constructive trust — are directed against the Tribe,[13] we agree that these counts do not fall within the scope of the Article 23 waiver. These counts are therefore barred and the district court erred

13. Count five of the complaint is not directed against the Tribe; it seeks only to hold Cypress and Lehtinen individually liable for conversion.

in refusing to dismiss them as to the Tribe. Counts one (a), two, and three of the complaint, however, seek only a declaration that the disputes between Tamiami and the Tribe that arise out of or relate to the Agreement are arbitrable, a judgment requiring the Tribe to comply with the October 1993 arbitration award, and a judgment compelling the Tribe to arbitrate certain disputes arising out of or relating to the Agreement. Plainly, these counts seek the type of relief expressly contemplated by Article 23.[14] Thus, the district court correctly refused to dismiss these counts on the ground of sovereign immunity.

Turning to the individual defendants' claims of immunity as tribal officers,[15] we begin with the proposition that tribal officers are protected by tribal sovereign immunity when they

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14. We read count one (a) as requesting only that the district court, prior to ordering the Tribe to arbitrate a given dispute as requested in count three, determine that Tamiami has properly invoked an arbitration proceeding as to that dispute under Article 12 of the Agreement. So read, we find that count one (a) clearly falls within the portion of the Article 23 waiver that permits the district court to "enforce the terms [of the Agreement] specifically, [in the event that the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12."

15. Each of the individual defendants claims tribal officer status; Tamiami does not dispute this claim. We therefore assume, without deciding, that all of the individual defendants — including attorney Lehtinen — were officers of the Tribe who undertook the complained-of actions in their official capacities. *Cf. Stock West Corp. v. Taylor*, 942 F.2d 655, 664-65 (9th Cir. 1991), *modified on reh'g*, 964 F.2d 912 (9th Cir. 1992) (en banc) (citing cases and discussing issue of when tribal attorney is acting as tribal official).

act in their official capacity and within the scope of their authority; however, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority.[16] In *Tamiami II*, 63 F.3d at 1050-51, we relied on *Ex parte Young* in affirming the district court's ruling that the Tribe's sovereign immunity did not shield the individual defendants from Tamiami's suit. Our holding pertained to the third count of Tamiami's amended complaint, which was brought under IGRA and its regulations. This count essentially alleged that the individual defendants, by abusing the licensing authority conferred by IGRA, had acted beyond the authority that the Tribe was capable of bestowing upon them. Tamiami's claims against the individual defendants in its present (second amended) complaint, however, do not mention IGRA or licensing at all. Instead, in counts one (b) and four through six, Tamiami merely offers various theories under which the individual defendants must pay it forty percent of MIB's net revenues. In our view, these claims against the individual defendants are simply a thinly-disguised attempt by Tamiami to obtain specific performance of the Tribe's obligations under the Agreement, which allocates forty percent of MIB's

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16. *See Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Tamiami II*, 63 F.3d at 1050-51; *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574-75 (10th Cir. 1984); *Thompson v. Crow Tribe of Indians*, 962 P.2d 577, 581-82 (Mont. 1998); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (citing *Ex parte Young* and finding that a tribal officer was not protected by tribal sovereign immunity from a suit to enjoin enforcement of a tribal ordinance that allegedly violated a federal statute).

net revenues to Tamiami. The doctrine of *Ex parte Young* may not be used in this fashion. It is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract. *See, e.g., Ex parte Young*, 209 U.S. 123, 151, 28 S. Ct. 441, 450, 52 L. Ed. 714 (1908) (citing *Ex parte Ayers*, 123 U.S. 443, 504, 8 S. Ct. 164, 182, 31 L. Ed. 216 (1887); *Hagood v. Southern*, 117 U.S. 52, 67-68, 6 S. Ct. 608, 615, 29 L. Ed. 805 (1886)); *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 294-95 (7th Cir. 1993). We hold, therefore, that the district court erred in rejecting the individual defendants' claims of sovereign immunity under the doctrine of *Ex parte Young*.

IV.

For the foregoing reasons, the defendants' request that we exercise pendent appellate jurisdiction over the issue of whether Tamiami's second amended complaint fails to state a claim is DENIED. On the issue of subject matter jurisdiction, the district court's denial of the defendants' motions to dismiss is AFFIRMED. On the issue of sovereign immunity, the district court's denial of the Tribe's motion to dismiss is AFFIRMED as to counts one (a), two, and three, and REVERSED as to counts one (b), four, and six. The district court's denial of the individual defendants' motions to dismiss on the ground of sovereign immunity is REVERSED. We REMAND this case to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5262

TAMIAMI PARTNERS, LTD. by and through TAMIAMI DEVELOPMENT CORP., its general partner,

Plaintiff-Appellee,

versus

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; BILLY CYPRESS; JASPER NELSON; JIMMIE BERT; MAX BILLIE; HENRY BERT; and DEXTER LEHTINEN,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

ORDER:

"Appellants' motion requesting pendent appellate jurisdiction" and "Defendant Dexter Lehtinen's motion requesting Eleventh Circuit to accept pendent appellate jurisdiction" are DENIED, as moot.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ON PENDING MOTIONS DATED AND FILED SEPTEMBER 27, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-0489-CIV-HIGHSMITH

TAMIAMI PARTNERS, LTD. by and through TAMIAMI DEVELOPMENT CORPORATION, its general partner,

Plaintiff,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, BILLY CYPRESS, JASPER NELSON, JIMMIE BERT, MAX BILLIE, HENRY BERT, and DEXTER LEHTINEN,

Defendants.

ORDER ON PENDING MOTIONS

THIS CAUSE came before the Court upon the following motions:

(1) Defendants Miccosukee Tribe of Indians of Florida, Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, and Henry Bert's motion to dismiss second amended complaint (D.E. # 214);

Appendix B

(2) Defendant Dexter Lehtinen's motion to dismiss second amended complaint (D.E. # 215); and

(3) Plaintiff Tamiami Partners, Ltd.'s ("TPL") motion for partial summary judgment (D.E. # 217).

For the reasons stated below, the Court denies all motions.

PROCEDURAL BACKGROUND

On February 28, 1994 this Court issued an order regarding defendants' motion to dismiss the amended complaint. *Tamiami Partners v. Miccousukee Tribe*, 898 F. Supp. 1549 (S.D. Fla. 1994). The Court dismissed with prejudice TPL's claims against the tribal entities which were then before the Court as defendants (the Miccosukee Tribe of Indians of Florida, the Tribe's Business Council, the Tribal Court and the Tribal Gaming Agency). With regard to the Tribal Court, the Court found that the claims against it were moot, thereby requiring dismissal under the "case or controversies" requirement of Article III of the United States Constitution. With regard to the other tribal entities, the Court found that the claims against them were barred by sovereign immunity. The Court denied the motion to dismiss with respect to individual defendants Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, and Minnie Bert, finding that sovereign immunity did not extend to them, pursuant to the *Ex Parte Young* doctrine.

On October 20, 1995, the Eleventh Circuit Court of Appeals affirmed in part this Court's order. *Tamiami*

Appendix B

Partners v. Miccosukee Tribe, 63 F.3d 1030 (11th Cir. 1995). The Eleventh Circuit recognized the mootness of the claims against the Tribal Court and made it applicable to the individual defendants who were tribal court judges (Andy Buster and Minnie Bert). With regard to the claims against the other tribal entities, the Eleventh Circuit stated that sovereign immunity barred TPL's breach of contract claim, but not the claim alleging violations of the Indian Gaming Regulatory Act ("IGRA") and the regulations of the National Indian Gaming Commission ("NIGC"). The Eleventh Circuit found, however, that because IGRA provides no right of action, TPL had failed to state a claim for relief under IGRA or NIGC regulations. Thus, the Eleventh Circuit affirmed the dismissal of the claims against all of the tribal entities. In a footnote, the Eleventh Circuit further opined:

> Tamiami remains free, of course, to seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration of any remaining contract disputes.

Tamiami Partners, 63 F.3d at 1048 n.66.

With regard to the individual defendants (excepting the tribal judges), the Eleventh Circuit affirmed this Court's finding that they are not protected by sovereign immunity under the doctrine of *Ex Parte Young*. In a footnote, however, the Eleventh Circuit expressed doubts that TPL could state a claim for relief against them, given its prior determination that IGRA provides no right of action as to the tribal entities:

Appendix B

> We note that the district court must answer a similar question with respect to Tamiami's claims against the tribal officers: If, as Tamiami argues, the tribal officers have violated the authority the Tribe is capable of granting them, can a cause of action against those officers be found, either implicitly or explicitly, in IGRA?

Tamiami Partners, 63 F.3d at 1051 n.72.

After remand, TPL moved for leave to file a second amended complaint, which the Court granted. The second amended complaint names as defendants the Tribe itself, the individual members of the Business Council and the Tribal Gaming Agency (Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert) and the Tribe's legal counsel, Dexter Lehtinen. It asserts the following claims:

Count I: Declaratory relief against all defendants, with regard to the arbitrability of the contract disputes between TPL and the Tribe and with regard to monies currently frozen at Jefferson National Bank.

Count II: Enforcement of arbitration award against the Tribe.

Count III: Compulsion of further arbitration against the Tribe.

Count IV: Injunctive relief as to the individual defendants to compel them to vacate orders with regard to monies at Jefferson Bank.

Appendix B

Count V: Conversion against Billy Cypress (Chairman of the Tribe) and Dexter Lehtinen (Counsel for the Tribe).

Count VI: Constructive Trust and Accounting.

As previously noted, all defendants have moved to dismiss the second amended complaint. In addition, TPL has moved for partial summary judgment as to Counts I and VI.

MOTIONS TO DISMISS

Upon its review of the second amended complaint and close study of the Eleventh Circuit's opinion, the Court finds that TPL has conformed its second amended complaint to the judicial determinations expressed in said opinion. TPL has asserted claims in Counts I, II, and III which are predicated upon the arbitration clause of the Management Agreement, in accordance with footnote 66 of the opinion (quoted above). The Court views this footnote comment as a guidepost issued by the Eleventh Circuit to this Court and to the parties regarding further proceedings upon remand. Indeed, the thoroughness of the opinion, as well as the Eleventh Circuit's rebuff of the defendants' requests for deletion of the footnote from the opinion, lead this Court to the inescapable conclusion that the Eleventh Circuit contemplated assertion of such claims upon remand. Therefore, the Court rejects the defendants' arguments regarding lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim as to Counts I, II, and III of the second amended complaint. Similarly, the Court finds no merit in the defendants' arguments that TPL has waived arbitration.

With regard to Counts IV, V, and VI, the Court finds that it has jurisdiction to address those state law claims under the aegis of supplemental jurisdiction. Moreover, the Court rejects the individual defendants' invocation of sovereign immunity as to the claims asserted against them, pursuant to its prior analysis under the doctrine of *Ex Parte Young*, which was affirmed by the Eleventh Circuit.

MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs have moved for partial summary judgment as to Count I (Declaratory Judgment) and Count VI (Constructive Trust and Accounting). The Court finds that this motion is premature since the case is not yet at issue. Moreover, the declaratory judgment and constructive trust claims both go to the heart of this controversy, in which every factual (and legal issue) has been and continues to be disputed among the parties. Therefore, the Court finds it inappropriate to dispose of these core claims in summary fashion.

CONCLUSION

Based on the foregoing considerations, it is

ORDERED AND ADJUDGED as follows:

(1) Defendants Miccosukee Tribe of Indians of Florida, Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, and Henry Bert's motion to dismiss second amended complaint (D.E. # 214) is DENIED.

(2) Defendant Dexter Lehtinen's motion to dismiss second amended complaint (D.E. # 215) is DENIED.

(3) Plaintiff Tamiami Partners, Ltd.'s motion for partial summary judgment (D.E. # 217) is DENIED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 27th day of September, 1996.

s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 16, 1995

TAMIAMI PARTNERS, LTD., By and Through its general partner, TAMIAMI DEVELOPMENT CORPORATION,

Plaintiffs-Appellants,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; Business Council of Miccosukee Tribe of Indians of Florida; Miccosukee Tribal Gaming Agency; Miccosukee Tribal Court; et al.,

Defendants-Appellees,

TAMIAMI PARTNERS, LTD., By and Through its general partner, TAMIAMI DEVELOPMENT CORPORATION,

Plaintiffs-Appellees,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; Business Council of Miccosukee Tribe of Indians of Florida; Miccosukee Tribal Gaming Agency; Miccosukee Tribal Court,

Defendants,

Appendix C

Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, Minnie Bert,

Defendants-Appellants.

TAMIAMI PARTNERS, LIMITED,

Plaintiff-Appellant,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, Business Council of the Miccosukee Tribe of Indians, Miccosukee Tribal Gaming Agency, Miccosukee Tribal Court,

Defendants-Appellees,

Billy Cypress, Jasper Nelson, et al.,

Defendants.

Nos. 94-4403, 94-4405 and 94-4578.

United States Court of Appeals,
Eleventh Circuit.

Aug. 16, 1995.

* * *

Appendix C

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG*, Senior District Judge.**

TJOFLAT, Chief Judge:

This case arises out of a contractual dispute between the Miccosukee Tribe of Indians of Florida ("the Tribe")[1] and Tamiami Partners, Ltd., the management contractor selected by the Tribe to manage the bingo gaming facility. When efforts to settle the dispute failed, Tamiami brought this action against the Tribe, the Tribe's Business Council and Gaming Agency, and the officers of these tribal entities who are responsible for overseeing the gaming operation (the "individual defendants" or "tribal officers"). The district court dismissed all claims against the Tribe, the Business Council, and the Gaming Agency on the ground that, because the Tribe has not waived its sovereign immunity, these tribal entities are not subject to suit. The court refused to extend the Tribe's sovereign immunity to the individual defendants, however, and denied their motion to dismiss the case.

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

** Judge Young heard oral argument but did not participate in this decision. This decision is rendered by quorum. 28 U.S.C. § 46(d).

1. The Tribe is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1988).

After making these rulings, the district court granted the Tribe, the Business Council, and the Gaming Agency final judgment, pursuant to Fed.R.Civ.P. 54(b), and Tamiami appealed. The individual defendants also appealed, asserting that they are entitled to immediate appellate review of their claim to tribal immunity under the collateral order doctrine established by *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

We affirm the district court's dismissal of Tamiami's complaint against the Tribe, the Business Council, and the Gaming Agency because the complaint fails to state a claim for relief against them. Furthermore, we affirm the district court's determination that the individual defendants are not shielded by the Tribe's sovereign immunity.

This case has a convoluted history. In an earlier appeal, *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir.1993), we remanded the case to the district court with the admonition that, if one of the parties did not replead its case within thirty days, the district court must dismiss the case. *Id.* at 508. Tamiami repleaded its case, and, in the aftermath of bitter infighting among the parties, the case is here once again.

To place the issues presented by these appeals in proper context, we first review the federal statutory scheme under which the Tribe established and currently operates its bingo facility[2] and then review the history of this litigation. Next,

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2. We review the statutory scheme in considerable detail in part I *infra* because a full understanding of the scheme is necessary

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we address the questions whether Tamiami has stated a claim for relief against the Tribe, the Business Council, and the Gaming Agency and whether the tribal officers, if they have presented a cognizable appeal under the *Cohen* doctrine, are entitled to sovereign immunity.

I.

A.

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988) ("IGRA" or "the statute"), a comprehensive statute governing the operation of gaming facilities on Indian lands.[3] For

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to a resolution of Tamiami's appeal of the district court's final judgment dismissing its claims against the Tribe, the Business Council, and the Gaming Agency in No. 94-4578. Moreover, throughout this litigation the parties have consistently ignored the relevant provisions of the statute and implementing regulations.

3. IGRA divides Indian gaming into three categories: class I, class II, and class III. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations," 25 U.S.C. § 2703(6); class II gaming primarily consists of "the game of chance commonly known as bingo . . . including . . . pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . , " *id.* § 2703(7)(A); class III gaming "means all forms of gaming that are not class I gaming or class II gaming," *id.* § 2703(8), and thus includes slot machine, parimutuel, and casino gaming.

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several years prior to the enactment of IGRA, Congress had considered the need for federal legislation to govern the rapidly expanding field of Indian gaming.[4] As stated in the

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Because this appeal concerns only class II gaming, we make reference to the other classes only as is necessary to facilitate our discussion of the issues before this court.

4. Congress supported its enactment of the statute with the following findings:

> (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
>
> (2) Federal courts have held that section 81 of [Title 25] requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Id. § 2701.

Senate Report submitted with the statute at the time of its passage, "[t]he purpose of the act is to provide a statutory basis for operating Indian gaming to promote economic development, to shield tribes from organized crime, to assure fairness to operators and players, and to establish a Federal regulatory authority for Indian gaming to meet congressional concerns." S.Rep. No. 446, 100th Cong., 2d Sess. 15-16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085-86. The legislative history makes clear the purpose and effect of the statute: to protect the Indian gaming industry from corruption and to provide for extensive federal oversight of all but the most rudimentary forms of Indian gaming.[5]

The statute affirms tribal sovereignty by noting that "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow *State* jurisdiction on Indian lands for the regulation of Indian gaming activities." *Id.* at 5-6, 1988 U.S.C.C.A.N. at 3075 (emphasis added).[6] The Senate report unequivocally states, however, that IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Id.* at 6, 1988 U.S.C.C.A.N. at 3076. The occupation of this field by federal

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5. "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter." 25 U.S.C. § 2710(a)(1).

6. The requirement of affirmative election of "State laws and State jurisdiction" anticipates that tribes could elect to be subject to state jurisdiction pursuant to a Tribal-State compact negotiated for the purpose of instituting class III gaming on Indian lands. *See* 25 U.S.C. § 2710(d).

law is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute.

B.

IGRA established the National Indian Gaming Commission (the "NIGC" or "Commission"), a three-member body within the Department of the Interior consisting of a Chairman appointed by the President and two associate members appointed by the Secretary of the Interior. *See* 25 U.S.C. § 2704(a), (b)(1). The statute confers extensive powers upon the Chairman and the Commission.

The Chairman's powers, outlined in section 2705 of the statute, include the power to close a gaming facility temporarily,[7]

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7. Section 2713(b) provides that:

> (1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions . . . .
>
> (2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

to fine,[8] to approve tribal ordinances and resolutions,[9] and to approve management contracts.[10] The Commission's discretionary powers, outlined in sections 2706(a) and (b), include the power to adopt regulations governing fines,[11] to authorize the Chairman to issue subpoenas,[12] to close a

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8. Section 2713(a) dictates that:

> (1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions . . . .
>
> (2) The Commission shall, by regulation, provide an opportunity for appeal and hearing before the Commission on fines levied and collected by the Chairman.

The regulations governing appeals, as promulgated by the Commission, are discussed in section I.E. *infra*.

9. Section 2710, which governs the Chairman's approval of ordinances and resolutions, is discussed in detail in section I.C. *infra*.

10. Section 2711, which governs the Chairman's approval of management contracts, is discussed in detail in section I.D. *infra*.

11. *See supra* note 8.

12. Section 2715(a) specifies that:

> [T]he Commission shall have the power to require by subpoena the attendance and testimony of witnesses

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gaming facility permanently,[13] to inspect the books and records of a class II gaming facility, and to hold hearings. The Commission must monitor class II gaming continuously, inspect class II gaming premises, promulgate regulations necessary to implement IGRA, and conduct background investigations of, among others, management contractors, such as Tamiami, and their employees. 25 U.S.C. § 2706(b). Pursuant to its mandate to issue regulations, the Commission did so comprehensively. *See* 25 C.F.R. §§ 501.1-577.15 (1994).

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> and the production of all books, papers, and documents relating to any matter under consideration or investigation. . . .

Section 2715(c) instructs that:

> Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission . . . and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

13. *See supra* note 7.

Appendix C

C.

1.

Before a tribe may begin to operate an organized gambling facility, IGRA requires that the tribe adopt a tribal ordinance or resolution authorizing and governing gaming on the tribe's reservation. A tribe may "engage in, or license and regulate" class II gaming only if:

> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

25 U.S.C. § 2719(b)(1). The Chairman's approval of a tribal ordinance or resolution is contingent upon several factors set forth in the statute and the regulations. For example, the tribe must have "the sole proprietary interest and responsibility for the conduct of any gaming activity," *id.* § 2710(b)(2)(A),[14] and must provide

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14. The statute further orders that net revenues be distributed for the benefit of one or more of the following: the tribe, tribal members, tribal government, tribal economic development, charitable organizations, or local government agencies. *Id.* § 2710(b)(2)(B).

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annual outside audits of the gaming enterprise. *Id.* § 2710(b)(2)(C).[15]

2.

Section 2710(b)(2)(F) of IGRA, which governs a tribe's licensing of a management contractor and its employees, lies at the center of this controversy between the Tribe and Tamiami. Thus, we examine this statutory provision, and the NIGC's implementing regulations, in detail. The statute requires that the tribe conduct background investigations of "primary management officials and key employees of the gaming enterprise" and maintain ongoing oversight of these officials and employees.[16] 25 U.S.C. § 2710(b)(2)(F)(i).

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An exception to the "sole proprietary interest" requirement of § 2710(b)(2)(A) is allowed if the tribe wishes to license a "person or entity other than the Indian tribe" provided that the licensee agrees to conform with § 2710(b)(2)(B)(i)'s requirement that net revenues be distributed "to fund tribal government operations or programs." *Id.* § 2710(b)(4)(A).

15. IGRA also requires independent audits of "all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually . . . relating to such gaming." 25 U.S.C. § 2710(b)(2)(D). In addition, the construction, maintenance, and operation of gaming facilities must not present a threat to the environment or to public health and safety. *Id.* § 2719(b)(2)(E).

16. The NIGC Chairman's approval of a tribal ordinance is contingent upon the existence of tribal procedures that ensure adequate background investigations. *See id.* § 2710(b)(2)(F); 25 C.F.R. § 522.2(b).

Furthermore, the tribe must institute a system for licensing these individuals and must notify the Commission of the results of background investigations prior to licensing. *Id.* § 2710(b)(2)(F)(ii). A license may not be issued to any individual who presents "a threat to the public interest or to the effective regulation of gaming." *Id.* The Commission has "thirty days to notify the Indian tribe of any objections to the issuance of such license." *Id.* § 2710(c)(1). If the Commission finds that a license has been issued to an official who fails to satisfy the standards set forth in the statute, the Commission "shall suspend such license and, after notice and hearing, may revoke such license." *Id.* § 2710(c)(2). Significantly, as strongly implied by the statute[17] and expressly stated in the regulations,[18] the right to a hearing concerning licensing vests only upon the receipt of a license.

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17. Section 2710(c)(2) states:

> If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established [to pass a background investigation], the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

18. The regulations provide that the Commission shall notify the tribe that issued a gaming license if the recipient of that license is unsuitable because of criminal history, reputation, or the like. 25 C.F.R. § 558.5. The tribe must then suspend the license and hold a hearing on the proposed revocation of the license. 25 C.F.R. § 558.5(c). The revocation decision lies solely with the tribe, which "shall notify the Commission of its decision." *Id.* § 558.5(d). Section 558.1(d) states that "[a] right to a hearing under § 558.5 of this part shall vest only upon receipt of a license granted under an ordinance approved by the Chairman."

Neither the statute nor the regulations provides for Commission review of a tribe's refusal to issue a license.

Furthermore, under the regulations, a tribal ordinance must provide "[a] description of procedures for resolving disputes between the gaming public and the tribe or the management contractor." 25 C.F.R. § 522.2(f). The Commission's regulations do not address whether a tribal ordinance must provide a mechanism for the resolution of a dispute between the tribe and the management contractor. As discussed in section I.D. *infra,* however, the regulations do require that management contracts entered into after the Commission's promulgation of the rules concerning management contracts — that is, management contracts formed after January 22, 1993 — contain provisions for the resolution of such disputes.

3.

IGRA provides that "the Chairman shall approve [an] ordinance or resolution" not later than ninety days after its submission by the tribe "if it meets the requirements of [section 2710 of the statute]."[19] 25 U.S.C. § 2710(e). Existing ordinances and resolutions must also conform to the provisions of IGRA and the Commission's regulations.[20]

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19. If the Chairman has not acted by the end of the ninety-day period, the ordinance or resolution "shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter." 25 U.S.C. § 2710(e).

20. In accordance with § 2712 of the statute and § 523.2 of the regulations, an Indian tribe must, within 60 days of notification by

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Appendix C

If the Chairman rejects an ordinance or resolution (new or existing) or an amendment to an existing ordinance or resolution, the tribe has the right to appeal to the full Commission. 25 C.F.R. § 524.1. An entity other than the aggrieved tribe may participate in the tribe's appeal to the limited extent of filing one written submission to the Commission, unless "the Commission determines further participation would substantially contribute to the record." *Id.* § 524.2. Thus, the regulations provide no means by which a party, other than the tribe, may appeal the Chairman's rejection of a tribal gaming ordinance, resolution, or amendment — a party may only participate once the tribe has made such an appeal.

Under section 2714, "[d]ecisions made by the Commission pursuant to sections 2710 . . . [and] 2712 . . . shall be final agency decisions for purposes of appeal to the

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the Chairman, submit for the Chairman's review any ordinance or resolution adopted prior to October 17, 1988, the effective date of the statute. *See* 25 U.S.C. § 2712(a); 25 C.F.R. § 523.2. The Chairman then has ninety days to review the ordinance or resolution and, if it conforms with the requirements of § 2710(b) of the statute and § 522 of the regulations, discussed in subsections I.C.1. & I.C.2. *supra,* the Chairman shall approve it. 25 U.S.C. § 2710(b)(2); 25 C.F.R. § 523.3(a). If the ordinance or resolution does not meet these requirements, the Chairman must notify the tribe of the necessary modifications, and the tribe has 120 days to achieve compliance. 25 U.S.C. § 2712(b)(3); 25 C.F.R. § 523.3(b), (c). Under § 523.4 of the regulations, a tribe must submit any amendments of an existing ordinance to the Chairman, who then has 90 days to determine whether the amendment satisfies the requirements of the statute and the regulations. 25 C.F.R. § 523.4.

appropriate Federal district court pursuant to chapter 7 of Title 5 [the Administrative Procedure Act]." 25 U.S.C. § 2714.[21]

D.

The Chairman also has responsibility for approving or disapproving management contracts made between Indian tribes and contractors for the purpose of conducting class II gaming. All management contracts, including those — such as the contract involved in this case — previously approved by the Secretary of the Interior, must be approved by the Chairman.[22] Section 2711(a) requires, as a condition of

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21. Section 2714 also applies to Commission decisions made pursuant to § 2711 and § 2713. *See* 25 U.S.C. § 2714; *infra* sections I.D. and I.E.

22. As with existing ordinances, discussed in subsection I.C.3. *supra*, IGRA and its implementing regulations provide for the Chairman's review of management contracts made prior to October 17, 1988, the effective date of the statute. Under § 2712, after notification by the Chairman, a tribe or management contractor must provide such contract for review. If the contract complies with the provisions of § 2711, the Chairman shall approve it; if it does not comply, the parties must make the necessary modifications within the prescribed time limits. *See* 25 U.S.C. § 2712(c).

Because § 2709 provides that the Secretary of the Interior would continue to regulate gaming until the Commission became functional, any management agreement approved by the Secretary after enactment of IGRA but before the Commission's organization would not be subject to the requirements of § 2712. This gap in the

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approval, that those individuals forming the proposed management entity provide detailed information, including personal data, previous gaming experience, and extensive financial statements.[23] 25 U.S.C. § 2711(a)(1). The Chairman

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statute appears to have been addressed by the NIGC regulations, which state:

> A tribe or a management contractor shall submit a management contract to the Chairman for review as follows:
>
> (a) Contracts approved by the Secretary, within sixty (60) days after a request by the Chairman. . . .
>
> (b) All other contracts, upon execution.

25 C.F.R. § 533.2. Thus, under the regulations, the Chairman has discretion to determine whether contracts approved by the Secretary after October 17, 1988 should be submitted to him for review. *See United States ex rel. Mosay v. Buffalo Bros. Management, Inc.*, 20 F.3d 739, 744 (7th Cir.1994) (noting the "anomaly" created by § 2712), *cert. denied*, __ U.S. __, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994).

23. Under § 2711(b), "[t]he Chairman may approve any management contract entered into pursuant to this section" only if he finds that the contract provides for: (1) adequate accounting procedures and financial reports; (2) tribal access to the daily operation of the gaming in order to verify revenue and income; (3) minimum guaranteed payments to the tribe; (4) a ceiling for the repayment of development costs; (5) a contract term length not exceeding prescribed maximums; and (6) grounds and mechanisms for terminating the contract. 25 U.S.C. § 2711(b). Section 531.1 of the regulations contains specific provisions related to each of these statutory requirements.

has authority to "approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances."[24] 25 U.S.C. § 2711(c)(1). Section 2711(e) sets forth specific restrictions on the Chairman's authority to approve a management contract.[25]

In addition, section 531.1 of the regulations mandates that contracts not already approved by the Secretary of the

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24. The regulations set the maximum percentage at "[n]ot more than forty (40) percent of the net revenues if the Chairman is satisfied that the capital investment required and income projections" favor such an arrangement. 25 C.F.R. § 531.1(i)(2).

25. The Chairman shall not approve the contract if any person in the management group, or any person with a financial interest in the management group, is an elected member of the tribe; has been or is later convicted of a felony or gaming offense; has knowingly or willfully provided materially false background information; or poses a threat to the fair, effective, and legal operation of the gaming enterprise. 25 U.S.C. § 2711(e)(1). Furthermore, the Chairman shall not approve the contract if "the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity," *id.* § 2711(e)(2); if "the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter," *id.* § 2711(e)(3); or if "a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract." *Id.* § 2711(e)(4). These statutory standards for disapproval of management contracts are essentially duplicated in the regulations. *See* 25 C.F.R. § 533.6(b).

Interior as of January 22, 1993 — the date the Commission promulgated its management contract regulations — include certain additional mechanisms to, among other things, ensure that all gaming "will be conducted in accordance with [IGRA] and governing tribal ordinance(s)" and to provide a mechanism to resolve disputes, including those between the management contractor and the tribe.[26] *See* 25 C.F.R. § 531.1(a), (k).

Under section 2711(d) of the statute, the Chairman has a maximum of 180 days to determine whether the management contract satisfies the prescribed criteria.[27] Furthermore, IGRA provides that "[t]he Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the [specified] period." 25 U.S.C. § 2711(d). Section 2714, which permits federal district court review of final agency decisions pursuant to the Administrative Procedure Act, applies to decisions made by the Commission under section 2711.

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26. Section 531.1 also calls for contractual provisions that delegate responsibilities to each of the parties for various gaming functions, govern assignments and subcontracts (if permitted), determine the effect of ownership changes, and state that the contract is only effective upon approval by the Chairman. *See* 25 C.F.R. § 531.1(b), (*l*)-(n).

27. The time period for approval or disapproval may be extended by 90 days if the Chairman provides the reason for the delay, in writing, to the tribe. 25 U.S.C. § 2711(d).

Appendix C

E.

As discussed in section I.B. *infra*, the Chairman has broad powers, under section 2713 of the statute and sections 573 and 575 of the regulations, to levy fines and close gaming facilities. If the Chairman imposes either form of penalty, the affected Indian tribe or management contractor has the right to a hearing before the Commission or its appointed designee. 25 U.S.C. § 2713(a)(2), (b)(2); 25 C.F.R. § 577. A final decision of the Commission regarding fines or permanent closure is also "appealable to the appropriate Federal district court" pursuant to the Administrative Procedure Act. 25 U.S.C. § 2713(c).[28]

II.

A.

On September 25, 1985, the Tribe enacted Ordinance 85-3 (the "1985 Ordinance"), which authorized bingo gaming on its Tribal lands. This ordinance provided that "[t]he Tribe, through its duly constituted officers, may conduct a Bingo game or games on the Reservation either directly or through a qualified Contractor" and that Tribal revenue from the operation of bingo gaming "shall be utilized by the Tribe to promote the health, education and general welfare of its people."[29] Acting pursuant to this ordinance, the Tribe

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28. Section 2714, discussed in subsection I.C.3. *supra*, serves as a second source of authority for such appeal.

29. After Congress enacted IGRA in 1988, the Tribe amended the 1985 Ordinance, adding references to the statute and amending

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established a bingo facility and entered into an agreement with a "qualified contractor" to operate the facility. The Tribe selected Tamiami Development Corporation ("TDC"), a Florida corporation, as the contractor.

On April 7, 1989, the Tribe entered into an agreement (the "Management Agreement" or "Agreement") with TDC to operate a bingo facility under the gaming scheme authorized by the 1985 Ordinance and IGRA. For a fixed percentage of the facility's net bingo revenues, TDC agreed to purchase a parcel of real estate (outside the Miccosukee reservation), convey the parcel to the United States in trust for the Tribe, and then design, construct, and manage the facility. The Management Agreement has a seven-year term and allows TDC, at its option, to renew the Agreement for an additional term of three years.

Article 12 of the Agreement, entitled "Disputes — Arbitration," states that "[a]ll disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration." This article includes the method of selecting arbitrators, the procedures for those arbitrators to follow, and states that (unless otherwise provided) the Commercial Arbitration Rules of the American Arbitration Association are to govern any arbitration proceedings.

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certain provisions of the ordinance to conform to IGRA. The record does not reveal whether the 1985 Ordinance was amended before or after the execution of the management agreement involved in this case.

Appendix C

Under Article 23 of the Agreement, entitled "Waiver of Sovereign Immunity,"[30] the Tribe agrees to waive its common law immunity from a suit brought by Tamiami to compel arbitration under Article 12 or to enforce an arbitration award. Article 23 specifies that:

> The [Tribe] waives its sovereign immunity from suit as expressly provided in this Article. The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) [Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure by [Tribe] to abide by the terms of an arbitration award. . . . This waiver of sovereign immunity shall not become effective until Manager has given written notice to the Miccosukee Tribal Business Council, detailing

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30. Absent tribal waiver or congressional abrogation, an Indian tribe is shielded from suit by sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) (citations and internal quotations omitted). However, "because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313, 90 L.Ed.2d 881 (1986).

> the nature of the complaint and the [Tribe] shall have failed after 30 days following such notice to cure such complaint.

As required by IGRA,[31] the Tribe submitted the Management Agreement to the Secretary of the Interior for approval. The Secretary, through a designee, subsequently approved the Agreement.[32]

Following the Secretary's approval, TDC purchased a twenty-five acre site in Dade County, Florida and deeded it to the United States in trust for the Tribe; TDC then built the bingo facility. TDC's investment in the land and improvements totalled approximately $6.5 million.

On January 23, 1990, again with the Secretary's approval, the parties effected a novation of the Agreement whereby Tamiami Partners, Ltd., a Florida limited partnership, was substituted for TDC. TDC remained associated with the gaming enterprise, however, as

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31. *See supra* note 22.

32. The Tribe and TDC made their agreement prior to the organization of the three-member Commission. The Commission was fully constituted in April 1991, after the Secretary of the Interior had appointed two Commissioners, and the Senate had confirmed the Chairman. The Commission promulgated its regulations throughout 1992 and 1993, the majority of the regulations being issued on January 22, 1993. Consequently, under section 2709 of the statute, at the time the Agreement was reached, the Secretary of the Interior (or the Secretary's designee) held the authority to approve the Agreement.

Tamiami's general partner. In September 1990, Miccosukee Indian Bingo ("MIB") began operations.

On August 9, 1991, the Tribe, carrying out IGRA's mandate,[33] adopted Ordinance No. 08-09-91 (the "1991 Ordinance") to provide for the registration and subsequent licensing of the managers and key employees of its gaming enterprises, including the one managed by Tamiami. The 1991 Ordinance established a Tribal Gaming Agency to oversee the Tribe's gaming operations, including the background investigation and licensing of the managers and key employees. As to each person licensed, the ordinance required the Agency to notify the NIGC of the results of the background investigation.[34] The ordinance gave the Tribe's Chief of Police the responsibility for conducting these background investigations, reporting the investigation results to the Tribal Gaming Agency, and recommending whether a license should issue. Anyone denied a license was given the right to appeal to the Gaming Agency and, if still dissatisfied, to the Tribal Court.[35]

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33. *See supra* subsection I.C.1.

34. This provision was required by 25 U.S.C. § 2710(b)(2)(F). *See supra* subsection I.C.2.

35. In the fall of 1991, the Tribe submitted the 1991 Ordinance to the NIGC with a request that the Commission "provide a written analysis as to whether these items meet the regulatory requirements of the IGRA." In its letter of response, the Commission noted that it had not yet promulgated regulations prescribing precise standards for licensing and, therefore, could not provide a definitive response.

(Cont'd)

Appendix C

B.

The Tribe made offers to purchase Tamiami's interest in MIB on two separate occasions during the first sixteen months of the bingo facility's operations. The Tribe's first offer was for $2 million less than Tamiami's initial investment in the enterprise; the second offer was for the amount of Tamiami's investment.[36] Tamiami rejected both

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Nevertheless, the Commission commented that "[t]he information being requested appears to be within the scope of the Tribe's authority to require," and "[t]he information requirements imposed appear not to be in conflict with the requirements of the IGRA and should provide much of the information necessary to conduct the background investigations and make the required determinations as to suitability for employment."

As with preexisting management agreements, discussed *supra* note 22, the provisions of IGRA dealing with the Chairman's approval of preexisting ordinances do not address the procedures for approving ordinances made after enactment of IGRA but before the Commission began to function. Technically, the Tribe should have submitted the 1991 Ordinance to the Secretary of the Interior for approval. *See supra* note 22; *see also* 25 U.S.C. § 2709. Given the Commission's response to the Tribe's letter, however, it appears that the 1991 Ordinance was valid. Section 2710(e) of the statute, which states that any ordinance not approved by the Chairman within 90 days of submission "shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of [IGRA]" supports this conclusion.

36. The Tribe's two offers are described in Tamiami's amended complaint. The Tribe's answer to that complaint denied that it had made any such offers. The materials in the record suggest that the offers were made as alleged. Whether this is so, however, has no bearing on the decision we reach today.

offers. Thereafter, in a letter dated January 28, 1992, the Tribe notified Tamiami that the Agreement had been "terminated by action of the [Tribe's] Business Council . . . effective 30 days from the date hereof, because of repeated and flagrant violations of the letter and spirit of that Agreement." Among other things, the Tribe alleged that Tamiami had: (1) refused to allow Tribal representatives to inspect the business and financial records of the gaming enterprise; (2) impeded the ability of outside accountants to conduct an audit of the enterprise; (3) failed to obtain the Tribe's approval of non-budgeted expenditures; (4) violated the 1991 Ordinance by failing to register its managers and key employees (presumably so that their backgrounds could be investigated and licenses issued); and (5) failed to provide a plan for the preferential employment of Tribal members.

Tamiami responded to the Tribe's allegations on February 4, 1992, refuting each of the Tribe's stated reasons for terminating the Agreement and declaring that the termination was "ineffective" and was "a nullity." On February 11, the Tribe acknowledged receipt of Tamiami's response and advised Tamiami that the Agreement had been terminated effective the twenty-eighth of that month.

On February 25, pursuant to Article 12 of the Agreement, Tamiami formally demanded arbitration "to determine the validity of the Tribe's purported notice of termination." In its demand letter, Tamiami's attorney gave an interpretation of the dispute and made a request of the Tribe:

> [T]he Tribe intends to unilaterally settle this matter, even though the parties disagree regarding

> the merits of the Tribe's claimed right to terminate the Agreement. The Agreement requires that all disputes, controversies and claims under the Agreement be "settled by arbitration," not by unilateral action by one party to the Agreement . . . . [T]o avoid the extraordinary expense for both parties of filing an action in federal court to protect [Tamiami's] rights, I am also writing to request that the Tribe, without giving up any rights, claims or positions it might have, defer any action on the purported termination until this matter is "settled by arbitration."

Tamiami requested that the Tribe respond to its letter by noon the following day.

The Tribe did not respond to Tamiami's demand for arbitration; instead, on February 26, it filed a "Statement of Claim" in the Miccosukee Tribal Court (the "tribal suit"). The Tribe alleged that Tamiami, "as manager of [MIB,] has violated federal and state law and tribal ordinances and customs, and a federally approved management agreement to the detriment of the Tribe." The Tribe sought the following relief: (1) a declaration that the Management Agreement had been terminated; (2) an order directing Tamiami to vacate the premises and to give the Tribe control of MIB; (3) an order directing the Tribal police to enforce such order; and (4) attorney's fees and costs.

On February 27, Tamiami answered the tribal suit by bringing this action against the Tribe in the United States District Court for the Southern District of Florida. Tamiami's

complaint sought an order, under Article 23 of the Agreement, compelling the Tribe to arbitrate the dispute as required by Article 12 of the Agreement[37] and preventing the Tribe from taking control of MIB pending the completion of such arbitration. On February 28, on Tamiami's application, the district court issued a temporary restraining order directing the parties to maintain the status quo.

On March 5, 1992, the district court issued the first of two interim "omnibus orders" in the case. Addressing the threshold question of its subject matter jurisdiction, the court concluded that such jurisdiction existed because the case presented the question of the exercise of tribal court power over a non-Indian:

> [T]his case requires that the [District] Court construe an agreement between Indians and non-Indians that includes a limited waiver of sovereign immunity by the Tribe; and that, on its face, provides for arbitration of all disputes arising from the agreement. The Court must interpret these contractual provisions to determine whether it should compel arbitration, thereby enjoining prosecution of a claim filed by the Tribe in tribal court. The case therefore, presents a federal common law question — the exercise of Tribal Court judicial power over non-Indians. *National Farmers Union Ins. Co. v. Crow Tribe of Indians,*

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37. Tamiami abandoned its request for an order to compel arbitration when it filed its amended complaint on September 14, 1993. *See infra* section II.C & subsection III.B.1.a.

> 471 U.S. 845, 852, 105 S.Ct. 2447, 2451, 85 L.Ed.2d 818 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331.")

Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 788 F.Supp. 566, 568 (S.D.Fla.1992) (citation omitted). The court, however, citing *Iowa Mutual Insurance v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) and *National Farmers* for the proposition that the federal court should "stay [ ] its hand until after the Tribal Court has had a full opportunity to review its own jurisdiction," *National Farmers,* 471 U.S. at 857, 105 S.Ct. at 2454, stayed further proceedings in the case pending the parties' exhaustion of their remedies in the Tribal Court. *Tamiami,* 788 F.Supp. at 570.[38] The district court therefore vacated the February 28

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38. It appears from the passages of the district court's first omnibus order quoted in the text that the district court misread Tamiami's claim for relief and thus misapplied *National Farmers.* In *National Farmers,* a tribal court awarded an Indian schoolchild a money judgment by default against a non-Indian school district that was insured by National Farmers Union Insurance Companies. The tribal court was preparing to issue a writ of execution, which National Farmers would have to satisfy. Contending that the judgment was invalid because the tribal court lacked jurisdiction to enter a money judgment against the non-Indian school district, National Farmers sought a federal district court order enjoining the execution of the writ. The district court had subject matter jurisdiction of the case under 28 U.S.C. § 1331 because the gravamen of National Farmers' (Cont'd)

temporary restraining order. The court also indicated that it would lift the stay if: (1) the Tribe, engaging in self-help,

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complaint was that the tribal court's judgment was invalid as a matter of federal common law. The district court issued the injunction. On certiorari, the Supreme Court held that, although the district court had jurisdiction to entertain National Farmers' claim, the court should have stayed its hand to give the tribal court an opportunity to determine whether it had jurisdiction to entertain the Indian schoolchild's suit against the non-Indian school district. The tribal court could make such determination on a motion by National Farmers to set aside the default judgment and dismiss the suit.

Tamiami's complaint against the Tribe *did not* allege that the Tribal court, lacking subject matter jurisdiction, was about to enter a judgment against Tamiami and that, unless the Tribal Court were enjoined, the judgment would issue and Tamiami would suffer irreparable injury. Rather, Tamiami's complaint alleged that the Tribe had breached its duty to arbitrate as required by Article 12 of the Agreement and that, as a result of such breach, Tamiami was entitled to a district court order to compel arbitration under Article 23, which provided the contract remedy for a breach of Article 12. As the district court stated in its first omnibus order, "Tamiami Partner's Verified Complaint prays for the entry of a declaratory judgment, holding that the Tribe is bound by the Agreement's arbitration clause; and for an injunction compelling arbitration and enjoining the Tribe from taking any action to seize or assume control of the Enterprise pending arbitration." *Id.* at 568 n. 4. In short, the district court did not have a *National Farmers* case before it. Tamiami was not seeking an order enjoining the enforcement of an allegedly invalid tribal court judgment; thus, *National Farmers'* instruction that, when faced with a challenge to the validity of a tribal court judgment against a non-Indian, a district court must stay its hand to give the tribal court an opportunity to address the issue was inapplicable.

attempted "to evict or otherwise impede Tamiami . . . from operating the gaming enterprise;" or (2) the Tribe failed to provide Tamiami "with two (2) business days' notice, prior to taking any action [ordered by the] Tribal Court." *Id.* at 567.

On July 3 and July 20, 1992, the Tribe denied two groups of license applications, seventeen in all, that had been submitted by Tamiami employees to the Tribal Gaming Agency the previous December. In the midst of these license denials, the Miccosukee Tribal Court, on July 16, issued its ruling in the tribal suit. After finding that it had jurisdiction to entertain "civil disputes between Indians . . . and non-Indians doing business on the Miccosukee Reservation" and that the parties were bound by the arbitration provisions of Article 12 of the Agreement, the Tribal Court directed the parties "to initiate arbitration proceedings in accordance with Articles 12 and 23 of the [Agreement]."[39] The Tribal Court retained jurisdiction, "pending the outcome of the required arbitration, to hear and determine the claims, if any, the Tribe has asserted under its civil governmental powers against [Tamiami] to the extent those claims are not the subject of arbitration under the Agreement."

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39. By citing Article 23, "Waiver of Sovereign Immunity," in its order, the Tribal Court tacitly acknowledged that the Tribe had agreed to waive its sovereign immunity and submit to the jurisdiction of the United States District Court for the Southern District of Florida in an action brought by Tamiami to enforce any award that Tamiami might receive in the arbitration proceedings the Tribal Court had ordered.

Appendix C

On July 21, after the Gaming Agency had denied the second group of license applications, Tamiami returned to the district court and filed an "Emergency Motion for Order Enjoining Tribe from Exercising Self Help to Terminate Management Contract." *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 803 F.Supp. 401, 403 (S.D.Fla.1992).[40] In its motion, Tamiami alleged that, under the pretext of issuing legitimate license denials, the Tribe had engaged in self-help to prevent Tamiami from operating MIB and effectively to terminate the Management Agreement. On July 24, the district court lifted its stay and issued a temporary injunction that "prohibited the Tribe from denying any additional license applications, pending the Court's review of the licensing process" that the Tribe had established pursuant to IGRA.[41] *Id.* at 405. On August 5, during a two-day evidentiary hearing before the district court, the Tribe filed in the Tribal Court a notice of compliance with that court's July 16 order compelling arbitration; the notice stated that the Tribe intended to proceed with arbitration.[42]

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40. According to the district court, Tamiami did not receive notice of the Tribal Court's July 16, 1992 order in the tribal suit until July 23, 1992 — two days after it filed the emergency motion. *Id.* at 405 n. 9.

41. The district court found that Tamiami's "work force had been decimated and that the working environment for Tamiami['s] present and prospective employees offered little, if any, job security." *Id.* at 405.

42. The arbitration panel eventually convened on December 17, 1992.

Appendix C

On August 19, 1992, the district court issued its second omnibus order. The court found that the Tribe's licensing process was "arbitrary and capricious," *id.* at 407, but determined that Congress, in enacting IGRA, had made no provision for suits by management contractors, such as Tamiami, to challenge a tribe's licensing procedures. The court concluded, "Congress did not consider the interests of non-Indian parties who choose to invest in Indian gaming." *Id.* at 408.[43] Apparently drawing on Congress' failure to allow management contractors the right to mount a judicial challenge to a tribe's licensing decision, the court held that Tamiami could not challenge, in an arbitration proceeding, the Tribe's refusal to license its managers and key employees; the court therefore denied Tamiami's emergency motion for injunctive relief.

The district court's continued belief that it had jurisdiction to grant Tamiami protective relief against the Tribe's resort to self-help pending the outcome of the arbitration ordered by the Tribal Court is illustrated by the following passage:

> Tamiami Partners brought this action to enforce the arbitration provisions of the Management Agreement and to prevent the Tribe

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43. The district court order stated that "[a]bsent a statutory grant of jurisdiction . . . [the court could not] declare unlawful a licensing process that, nevertheless, disturb[ed] its conscience." *Id.* We interpret the words "[a]bsent a statutory grant of jurisdiction" to mean absent the statutory grant, either explicitly or implicitly, of a right of action. *See Bell v. Hood,* 327 U.S. 678, 681, 66 S.Ct. 773, 775, 90 L.Ed. 939 (1946).

> from taking any action to seize or assume control of the gaming enterprise pending arbitration. Through its order compelling arbitration, the tribal court has granted Tamiami Partners part of the relief it sought from this Court. The protective relief sought by Tamiami Partners remains available through the Court's stay, rather than dismissal, of this action pending the outcome of arbitration.

Id. at 407 (footnotes omitted).

On August 21, Tamiami moved the district court for leave to file an amended complaint that sought two coercive orders: (1) an order compelling arbitration of the licensing dispute and (2) an injunction to prevent the Tribe from using the licensing process to frustrate Tamiami's operation of MIB. Assuming that its motion would be granted, Tamiami asked the court to issue these orders immediately in the form of a preliminary injunction. Before the court could respond to Tamiami's request, however, Hurricane Andrew struck south Florida, forcing the temporary closing of MIB and thereby providing a reprieve from the dispute between the parties.

On September 15, 1992, the district court denied Tamiami leave to amend its complaint and thus its request for a preliminary injunction. Two days later, Tamiami took interlocutory appeals from the district court's August 19 and September 15 orders. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 999 F.2d 503, 505 (11th Cir.1993).

Appendix C

While those interlocutory appeals were pending, the Tribe took several steps to oust Tamiami from the MIB enterprise. On April 13, 1993, the Tribal Gaming Agency denied licenses to Tamiami and to TDC as well as to two of its principle officers, Cye Mandel and John Sisto. At that time, the Gaming Agency also issued an order appointing a conservator to take control of MIB and to operate the facility. This order was "ratified and confirmed" the same day by the Tribal Court in its "Order in Aid of Enforcement of Tribal Gaming Agency's Order Appointing Conservator." Following the denial of the license applications and the entry of these orders, the Tribal police forced Mandel and Sisto to leave the MIB premises, the MIB accountant surrendered the MIB's financial records to Tribal officials, and the Tribe began the process of obtaining control of MIB's bank accounts.

Also on April 13, immediately after Tamiami had been ousted by the Tribe, Tamiami returned to district court seeking an injunctive order to prevent the Tribe from exercising self-help. On April 15, the court held an evidentiary hearing and issued its third omnibus order, holding that the Tribal Court had exceeded its jurisdiction in issuing the order ratifying the Gaming Agency's appointment of a conservator such that the order was null and void. The court also concluded that the Tribe had exceeded its sovereign powers in rejecting, through the Gaming Agency, the license applications of Tamiami, TDC, Mandel, and Sisto. The court viewed these rejections, although made under the guise of the Tribe's sovereign powers, as simply an attempt by the Tribe to circumvent the ongoing arbitration proceedings and to terminate the

Management Agreement. In sum, the court invalidated the Tribe's actions of April 13 and ordered the parties to return to the status quo ante of April 12.

The Tribe immediately requested that the district court certify its April 15 order under 28 U.S.C. § 1292(b) to allow the Tribe to appeal. The court certified the order, and, on the Tribe's application, we permitted the appeal. We thereafter consolidated the appeal with the two interlocutory appeals taken by Tamiami on September 17, 1992. At the same time, we stayed the district court's third omnibus order pending our disposition of these appeals.

On August 16, 1993, a panel of this court decided the three appeals. *Tamiami,* 999 F.2d 503.[44] Reviewing Tamiami's complaint, the panel held that, under the "well-pleaded complaint rule," Tamiami had failed to state a federal question within the meaning of 28 U.S.C. § 1331. *Id.* at 507. Instead, Tamiami's allegations established nothing more than the existence of a contract dispute. *Id.* The court

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44. The panel had jurisdiction to decide only two of the three appeals. In the first appeal, the court had jurisdiction to review the district court's August 19, 1992 omnibus order under 28 U.S.C. § 1292(a)(1) because the order denied Tamiami's application for injunctive relief. In the second appeal, the court had no jurisdiction to review the district court's September 15, 1992 order denying Tamiami leave to amend its complaint. We note that the panel's decision referred to Tamiami's proposed amended complaint, *id.* at 507; it did so, however, in addressing the question presented in the first appeal: whether the district court had subject matter jurisdiction to hear the case. As noted in the text, the court had jurisdiction over the third appeal under 28 U.S.C. § 1292(b).

acknowledged that although "[t]he right to be protected against an unlawful exercise of tribal court judicial power [presented] a claim arising under federal law," Tamiami's complaint failed to assert such a right. *Id.* Although the panel did not elaborate further,[45] it observed that "events had occurred and evidence was in the record that suggested a basis for district court jurisdiction." *Id.* at 508. Accordingly, the panel reversed the district court's April 15 order, with the following instructions:

> Because we are now aware of facts which suggest that the district court could have [subject matter] jurisdiction if the case arose today, we remand the case to the district court with directions that the district court dismiss this action unless one of the present parties files a complaint or other pleading which properly alleges jurisdiction. If such a complaint or petition is filed within thirty days of the date of remand, the district court shall proceed to frame and determine the issues in the usual manner.

Id. In short, the panel invited Tamiami, or the Tribe, to bring a new suit.

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45. We note, in passing, that it was not the panel's responsibility to search the record for federal questions; the responsibility belonged to the plaintiff. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 3233 n. 6, 92 L.Ed.2d 650 (1986).

Appendix C

C.

On remand, Tamiami filed an amended complaint on September 14, 1993 — the pleading now before us. In addition to the Tribe, Tamiami named as defendants the tribal Business Council, the tribal Gaming Agency, the Tribal Court, and eight individual members of those tribal bodies. In essence, the amended complaint asserted the following bases of federal question jurisdiction: (1) the Tribe's purported termination of the Management Agreement violated IGRA; (2) the Tribe's denial of gaming licenses violated IGRA; (3) individual members of the Business Council and the Gaming Agency had acted outside their lawful authority; and (4) the Tribal Court had exceeded its jurisdiction. Tamiami sought the following declaratory and injunctive relief: First, Tamiami asked the district court to declare invalid the Tribal Court's April 13, 1993 order ratifying the Gaming Agency's appointment of a conservator and the Gaming Agency's refusal to license Tamiami, TDC, Mandel, and Sisto. Second, Tamiami asked the court to return the parties to the status quo as of April 12, 1993 — when Tamiami was still operating the gaming enterprise; to issue an injunction against the Tribe to prevent interference with Tamiami's management of the MIB gaming enterprise; and to issue an order forcing the Tribe to turn over Tamiami's forty percent share of the enterprise's net gaming revenues.

On September 15, one day after Tamiami filed its amended complaint and five days before a final hearing was to be held before the arbitration panel convened pursuant to the Tribal Court's order of July 16, 1992, the Tribe moved the Tribal Court to stay the arbitration proceedings. The

Tribe's asserted reason for seeking the stay was Tamiami's allegation in its amended complaint that the Tribal Court lacked jurisdiction over Tamiami because Tamiami is a non-Indian. If that allegation were true, the Tribe argued, then the Tribal Court had no authority to order the arbitration. On September 16, the Tribal Court granted the motion and stayed the arbitration proceedings pending further order.

On September 21, the arbitration panel, concluding that the Tribal Court had no jurisdiction to enforce the arbitration provisions of the Agreement and that the panel's authority derived from Article 12 of the Agreement, disregarded the Tribal Court's September 16 order and declined to postpone the final hearing in the matter, which took place as scheduled on September 23. The Tribe refused to participate in the final hearing, as did the Tribe's chosen arbitrator. On October 6, the arbitration panel handed down its decision,[46] finding in favor of Tamiami and against the Tribe on all claims. The arbitration panel gave the Tribe the choice of reinstating Tamiami to its position as manager of MIB or terminating the Agreement by paying Tamiami $9.5 million. The panel also awarded Tamiami fees and costs.

After the arbitration panel's decision, the Tribal Court entered two orders that collectively withdrew it from the controversy. On October 12, 1993, the court vacated its April 13 order, which had ratified the Gaming Agency's appointment of a conservator for MIB; then, on October 25,

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46. Although the Tribe's chosen arbitrator did not participate in the final hearing on September 23, he did file a formal dissent to the panel's October 6 decision and award.

the court granted the Tribe's motion to dismiss the tribal suit. During this thirteen-day period the Tribal Court moved the district court to dismiss it from the case for want of a justiciable controversy. The Business Council, the Gaming Agency, and the individual defendants also moved for dismissal, contending not only that subject matter jurisdiction was lacking but also that the action was barred by the Tribe's sovereign immunity.

On October 26, the district court held a status conference and addressed a number of issues, including Tamiami's request for an order freezing the funds held in the MIB "reserve account." The court granted Tamiami's request and froze the funds.

D.

On February 28, 1994, the district court issued its order on the defendants' motions to dismiss — the order now before us. The court first addressed the Tribal Court's motion to dismiss and, observing that the Tribal Court was no longer exercising jurisdiction over the parties, dismissed as moot Tamiami's claims.

As for Tamiami's claims against the Tribe, the Business Council, the Gaming Agency, and the individual defendants, the court held that Tamiami's amended complaint raised a federal question — "namely, whether these defendants exceeded tribal powers in their actions towards [Tamiami]." The court then addressed whether, as the defendants contended, the Tribe's sovereign immunity barred the suit, and concluded that Tamiami's claims against the Tribe, the

Business Council, and the Gaming Agency were barred because the Tribe had not clearly waived its sovereign immunity and Congress had not abrogated such immunity from suits based on federal common law. Accordingly, the court dismissed with prejudice Tamiami's claims against the Tribal entities.

The individual defendants, however, were not shielded by the Tribe's sovereign immunity. Citing numerous cases applying the rationale of *Ex Parte Young* to Indian sovereign immunity, the court held that the individual defendants were subject to suit given Tamiami's allegation that they "have acted beyond the authority that the Tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes." *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (holding that a suit against an individual in his official governmental capacity — claiming that the individual is acting beyond his authority — is not a suit against the sovereign). Moreover, the court held that Tamiami was not required to exhaust its Tribal Court remedies against these defendants because Tamiami had alleged "bad faith" on the part of the individual defendants and, thus, had established an exception to the exhaustion rule under *National Farmers*.[47] Therefore, the court denied the individual defendants' motion to dismiss.[48]

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47. *See infra* section II.B.

48. On March 16, the individual defendants answered Tamiami's amended complaint. Although their answer is not before us, we note in passing that, in addition to denying Tamiami's allegations of misconduct, these defendants alleged that they could

(Cont'd)

Appendix C

E.

On March 28, 1994, in No. 94-4403, Tamiami appealed the portion of the district court's February 28 order dismissing its suit against the Tribe, the Business Council, the Gaming Agency, and the Tribal Court. The following day, in No. 94-4405, the individual defendants appealed the portion of the February 28 order rejecting their claim of tribal sovereign immunity.

On April 29, in appeal No. 94-4403, we asked the parties to brief the question whether the portions of the district court's February 28 order being challenged were appealable because the order disposed of fewer than all of the claims in suit and thus did not appear to be a final judgment under 28 U.S.C. § 1291. Tamiami responded by moving the district court to enter final judgment pursuant to Fed.R.Civ.P. 54(b) on its claims against the Tribal entities. The court granted Tamiami's motion and on May 19 entered final judgment as to those claims. On May 20, in No. 94-4578, Tamiami appealed that final judgment; this appeal supersedes the appeal in No. 94-4403, which we dismiss for want of

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not be held liable as "individual officials acting outside the scope of their authority, because the [amended] complaint in fact and in substance pleads only matters against the Tribe and tribal entities." This statement is false; the amended complaint contains numerous allegations of misconduct on the part of the individual defendants.

Furthermore, the individual defendants' answer acknowledged that "Miccosukee law always required adherence to applicable federal law." It is not clear what these defendants intended to convey through this statement.

jurisdiction. Pending before this court, therefore, are the appeals in Nos. 94-4405 and 94-4578, which we have consolidated.[49]

III.

A.

Before we consider whether Tamiami's amended complaint presents a claim for relief against any of the defendants in this case, we must first address a threshold question: whether the district court had subject matter jurisdiction to entertain any of Tamiami's claims as those claims stood on February 28, 1994, the day the district court dismissed them. At that time, there were live controversies between Tamiami and, respectively, the Tribe, the Business Council, the Gaming Agency, and the individual defendants.[50] We briefly describe these claims.[51]

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49. On March 29, the individual defendants moved the district court to stay further proceedings pending the disposition of these appeals. On March 31, the court granted the stay. In the same order, the court reaffirmed its October 27, 1993 order freezing the MIB reserve account but rejected Tamiami's request for a preliminary injunction directing the individual defendants to reinstate Tamiami as manager of MIB. The March 31 order has not been appealed.

50. Tamiami's claims against the Tribal Court were moot because, as the district court observed in its February 28 order dismissing the Tribal Court from the suit, the Tribal Court was no longer exercising jurisdiction over the parties.

51. Tamiami's amended complaint is a quintessential shotgun pleading, replete with vague and cursory allegations. The claims we describe in the text are gleaned from a fair reading of the amended complaint.

Appendix C

Tamiami's first claim is a breach of contract claim against the Tribe. Tamiami contends that the Tribe, operating through its Business Council and the Gaming Agency, has breached the Management Agreement by ousting Tamiami from the MIB premises and taking control of the gaming enterprise.[52] Tamiami seeks an injunction restoring its position as the MIB operator[53] and requiring the Tribe to give Tamiami its forty percent share of MIB's net gaming revenues.[54]

Tamiami's second claim is brought under IGRA and the NIGC's regulations against the Tribe and the Gaming Agency. Tamiami contends that the Tribe, through its Gaming Agency, has abused the licensing authority conferred by the statute and the regulations by refusing to license Tamiami, TDC, Mandel, and Sisto. Tamiami seeks an order declaring such an abuse of authority and enjoining the Gaming Agency to issue the requested licenses.[55] Although

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52. The Business Council, whose members also serve as the members of the Gaming Agency, handles the Tribe's business affairs.

53. An order restoring Tamiami as the MIB operator would, in effect, restore the status quo as of April 12, 1993, a form of relief specifically requested in Tamiami's amended complaint.

54. The Business Council and the Gaming Agency are not parties to the Management Agreement. Accordingly, we do not read Tamiami's allegations as seeking relief against these tribal entities for the Tribe's breach of the Agreement. Any relief granted against these tribal entities, therefore, would be purely ancillary, in aid of the district court's jurisdiction to litigate to final judgment Tamiami's breach of contract claim against the Tribe.

55. We do not read Tamiami's amended complaint as asserting that the Tribe, through the Business Council, abused its licensing authority.

IGRA does not expressly provide a right of action for such relief, Tamiami contends that such a right of action is implicit under IGRA's regulatory scheme.[56]

Tamiami's third and final claim is brought under IGRA and the NIGC's regulations against the individual defendants collectively as members of both the Business Council and the Gaming Agency.[57] Tamiami contends that these individual tribal members are executing the Tribe's plan to assume permanent control of the gaming enterprise by refusing to license Tamiami's managers and key personnel and that, as a result, these individuals are subject to suit under IGRA in the district court.[58] Tamiami seeks an injunction

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56. We presume that Tamiami does so because it could have no statutory claim unless this right of action is implied in IGRA.

57. In its amended complaint, Tamiami included as individual defendants two Tribal Court judges and the conservator for MIB appointed by the Gaming Agency on April 13, 1993. Because Tamiami's claims against the Tribal Court are moot, its claims against its judges also are moot. Accordingly, we declare appeal No. 94-4405 moot as to them. Because the Tribal Court vacated the conservator's appointment, thus mooting Tamiami's claim against him, the district court properly dismissed him from the case on October 26, 1993. The individual defendants remaining in appeal No. 94-4405 are, therefore, the members of the Business Council and the Gaming Agency.

58. Tamiami has pointed to nothing in IGRA's language that would give it the right to bring this claim against the individual defendants. *See Davids v. Coyhis,* 869 F.Supp. 1401, 1410 (E.D.Wis.1994) ("Even assuming that the defendants acted in

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ordering these defendants to grant the licenses at issue, to restore Tamiami to the MIB premises, and to turn over Tamiami's share of the net gaming revenues.

As explained below, each of Tamiami's claims, as we have cast them, "aris[es] under the . . . laws . . . of the United States," 28 U.S.C. § 1331. We first consider Tamiami's claim that the Tribe, operating through its Business Council and the Gaming Agency, has breached the Management Agreement. The Agreement incorporates — by operation of law if not by reference — the provisions of IGRA and the NIGC's regulations that govern MIB's operations.[59] Among

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(Cont'd)
violation of the IGRA and therefore outside the scope of their authority, plaintiffs cannot sue the defendants for violations of the IGRA unless such a cause of action is implicit in the IGRA."). We treat Tamiami as contending that IGRA has provided by implication this cause of action because Tamiami would have no claim otherwise. *See supra* note 56; *infra* note 72.

59. The Agreement states in paragraph sixteen thereof that "all gaming under this Agreement shall be conducted in accordance with . . . [IGRA]." The parties obviously inserted this provision into their contract in recognition of the fact that Congress, by enacting IGRA, has "expressly preempt[ed] the field in the governance of gaming activities on Indian lands," S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. In addition, § 2713(d) states that "[n]othing in [IGRA] precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with [IGRA] or with any rules or regulations adopted by the Commission." Accordingly, the parties were required to comply with IGRA's provisions and the Commission's regulations.

the incorporated provisions are those relating to the Tribe's licensing of the managers and key employees designated by Tamiami from time to time to operate the gaming facility.[60] According to Tamiami, such provisions impose upon the Tribe the obligation to process the applications of Tamiami's managers and key employees in good faith. The gravamen of Tamiami's contract claim is that the Tribe, acting through the Gaming Agency, has failed to act in good faith; instead, the Gaming Agency, abusing its licensing authority, has rejected these applications for the sole purpose of taking over the gaming facility. Tamiami's claims that the Tribe has an obligation under IGRA and the NIGC's regulations — which the Agreement incorporates — to process an application for a license in good faith and that the Tribe has breached that obligation are claims arising under federal law; hence the district court had subject matter jurisdiction over Tamiami's breach of contract claim against the Tribe.[61]

It is also clear that the district court had subject matter jurisdiction over Tamiami's second and third claims, which are based directly on IGRA and the NIGC's regulations. That, as we conclude in subsection III.B.1.b. *infra,* IGRA does not provide — either expressly or impliedly — the cause of

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60. Tamiami's amended complaint alleges that the Tribe has purposefully circumvented the requirements of § 2710(c) of IGRA, incorporated in the Agreement, that relate to licensing procedures in order to oust Tamiami from the MIB facility and thereby terminate the Agreement.

61. As we discuss in subsection III.B.1.a. *infra,* however, Tamiami cannot maintain its breach of contract claim in the face of the Tribe's plea of sovereign immunity.

action Tamiami alleges in its second claim did not defeat the district court's jurisdiction under 28 U.S.C. § 1331 "[f]or it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).[62]

B.

Having concluded that the district court had subject matter jurisdiction over Tamiami's claims, we turn to the question posed by appeal No. 94-4578: whether the district court properly dismissed Tamiami's claims against the Tribe.[63] We then consider appeal No. 94-4405 brought by the individual defendants, the members of both the Business Council and the Gaming Agency, challenging the district court's ruling that they are not shielded from suit by the Tribe's sovereign immunity.[64]

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62. Tamiami's IGRA claims are not "immaterial and made solely for the purpose of obtaining jurisdiction"; nor are they "wholly insubstantial and frivolous." *Bell,* 327 U.S. at 682-83, 66 S.Ct. at 776.

63. As noted in section II.D. *supra,* the district court also dismissed Tamiami's claims against the Business Council and the Gaming Agency. We treat the claims against those entities and the claims against the Tribe as one and the same.

64. We do not consider the case of the defendant members of the Tribal Court because the case against them is moot. *See supra* note 57.

Appendix C

1.

The district court dismissed all of Tamiami's claims against the Tribe on the ground of sovereign immunity. We agree that the doctrine of sovereign immunity bars Tamiami's first claim for breach of contract. We do not agree, however, that the doctrine bars Tamiami's second claim alleging violations of IGRA and the NIGC's regulations. We dispose of that claim on the separate ground that, because IGRA provides Tamiami no right of action, Tamiami has failed to state a claim for relief.

a.

Tamiami's breach of contract claim is barred by the doctrine of sovereign immunity unless the Tribe, by the very act of entering into the Management Agreement and engaging in the gaming enterprise, waived its immunity from suit by Tamiami or Congress, by enacting IGRA, abrogated that immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). Nothing in IGRA indicates that Congress abrogated the sovereign immunity of tribes that elect to engage in class II gaming; therefore, IGRA provides Tamiami no comfort. This is not to say, however, that Congress foreclosed the possibility that a management contractor might be able to sue a tribe for breach of a management agreement. Indeed, Congress contemplated that disputes between the tribe and its management contractor might arise and that the management contractor, in

negotiating the parties' agreement, would insist on the tribe's waiver of its sovereign immunity so that disputes could be settled in a neutral forum rather than in a tribal court. Accordingly, Congress mandated that every management contract contain "grounds and mechanisms for terminating such contract," 25 U.S.C. § 2711(b)(6); the Commission's regulation implementing this provision requires that the contract "[c]ontain a mechanism to resolve disputes between . . . [t]he management contractor and the tribe." 25 C.F.R. § 531.1(k)(2).

In the instant case, the parties agreed, in Article 12 of the Management Agreement, that "[a]ll disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration, as set forth in this Article 12." To provide an effective means of enforcing this arbitration provision, the parties agreed in Article 23 that the Tribe would waive its sovereign immunity and permit Tamiami to bring an action in the United States District Court for the Southern District of Florida to compel the Tribe to arbitrate and to enforce any resulting award.[65]

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65. Article 12 also provides that an "[arbitration] award . . . may be entered in and shall be specifically enforceable in any court of competent jurisdiction." Because the Tribe has limited its waiver of sovereign immunity under Article 23 to suits brought against it in the Southern District of Florida, it is apparent that a suit by Tamiami against the Tribe will not lie "in any court of competent jurisdiction" except the Southern District of Florida. The parties seemed to have agreed, however, under Article 12, that the Tribe could waive its sovereign immunity and enforce an arbitration award in any court of competent jurisdiction — for example, in the Circuit Court of Dade County, Florida.

Tamiami's first claim, however, is simply a breach of contract claim for which it seeks money damages and injunctive relief; Tamiami does not seek arbitration of the dispute at hand or the enforcement of an arbitration award, the type of relief contemplated by Article 23.[66] In sum, because the Article 23 waiver does not embrace Tamiami's first claim, the district court properly dismissed it.[67]

b.

Tamiami's second claim — that the Tribe, operating through its Gaming Agency, has refused to issue licenses in violation of the statute and regulations — fails because IGRA provides it no right to relief. This result should come as no surprise; as the Supreme Court has observed, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979) (citation and internal quotations omitted).

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66. Tamiami's original complaint sought an order compelling the Tribe to submit to arbitration; its amended complaint, however, does not seek that relief. Tamiami remains free, of course, to seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration of any remaining contract disputes.

67. Tamiami's amended complaint effectively concedes this point in stating that "the parties selected binding arbitration as the *exclusive* forum for the resolution of all disputes arising out of or relating to the Agreement." (Emphasis added).

As an initial matter, we find nothing in IGRA's language that would give a management contractor the express right to compel an Indian tribe to license the employees the contractor designates to operate the gaming facility. The only express right of action Congress gave management contractors is the right to seek judicial review in district court, under the Administrative Procedure Act, of some *Commission* decisions that adversely affect the contractor.[68]

Furthermore, after examining the IGRA regulatory scheme, we find nothing in the statute's language, or in the legislative history, to indicate that Congress implied the right of action Tamiami presents as its second claim for relief. Congress, however, did provide *other* private rights of action and did so explicitly. *See id.* at 572, 99 S.Ct. at 2487 ("Obviously, then, when Congress wished to provide a private . . . remedy, it knew how to do so and did so expressly."). In addition to giving management contractors the right to challenge some Commission decisions, as indicated above, Congress provided express rights of action for other aggrieved parties. For instance, section 2711 of the statute, the very section authorizing and providing for Commission approval of management contracts, states that "[t]he Indian tribe may bring an action in a United States

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68. As we relate in section I.E. *supra*, a management contractor may seek district court review of "[a] decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure . . . ." 25 U.S.C. § 2713(c). Furthermore, if the management contractor has standing under the Administrative Procedure Act (an issue that we do not decide here), it might seek district court review if the Commission were to disapprove of a new or existing management contract. *Id.* § 2714; *see infra* section I.D.

district court to compel action by the Chairman [of the NIGC] if a contract has not been approved or disapproved within the period required by this subsection."[69] In addition, section 2714 expansively provides that "[d]ecisions made by the Commission pursuant to sections 2710 ["Tribal gaming ordinances"], 2711 ["Management contracts"], 2712 ["Review of existing ordinances and contracts"], and 2713 ["Civil penalties"] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court" under the Administrative Procedure Act.[70] In the face of these express rights of action, we adhere to "[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers,* 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974). Accordingly, we decline Tamiami's invitation to read into IGRA the right of action Tamiami asserts as its second claim.

2.

Having disposed of appeal No. 94-4578, we now turn to No. 94-4405, the interlocutory appeal brought by the members of the Tribe's Business Council and Gaming Agency. As noted in section II.E. *supra,* this appeal challenges the portion of the district court's February 28, 1994 order rejecting the tribal officers' claim of tribal

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69. *See infra* section I.D.

70. *See infra* subsection I.C.3., sections I.D. & I.E.

sovereign immunity and denying their motion to dismiss the suit as to the claims against them.

Tamiami seeks injunctive relief against these defendants in their official capacities in the form of an order requiring them to comply with the provisions of IGRA and the NIGC regulations relating to the licensing of the employees whom the management contractor has selected to operate the MIB facility.[71] According to Tamiami, the individual defendants have wilfully disregarded these provisions and have refused to license these employees in furtherance of the Tribe's scheme to take over the gaming enterprise.

The question this appeal presents is whether the district court properly applied the *Ex Parte Young* doctrine in refusing to dismiss the tribal officers. Before addressing this question, however, we must decide whether the district court's denial of immunity is appealable under the *Cohen* collateral order doctrine. We hold that it is.

a.

To be immediately appealable under *Cohen,* the order at issue must: "(i) 'conclusively determine the disputed question,' (ii) 'resolve an important issue completely separate from the merits of the action,' and (iii) 'be effectively unreviewable on appeal from a final judgment.' " *Swint v. City of Wadley,* 51 F.3d 988, 1002 (11th Cir.1995) (quoting *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985)). In *Mitchell v.*

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71. *See infra* subsection I.C.2.

Forsyth, 472 U.S. 511, 525, 105 S.Ct. 2806, 2814-15, 86 L.Ed.2d 411 (1985), decided two days after *Richardson-Merrell,* the Supreme Court treated the third of these elements as the predominant one. "In discussing [the third *Cohen* factor], the Supreme Court emphasized that qualified immunity is an '*immunity from suit* rather than a mere defense to liability' and is 'effectively lost if a case is erroneously permitted to go to trial.' " *Griesel v. Hamlin,* 963 F.2d 338, 340 (11th Cir.1992) (per curiam) (quoting *Mitchell,* 472 U.S. at 526, 105 S.Ct. at 2815).

In *Griesel,* this court, following *Mitchell*'s guidance, posed the question "whether the state sovereign immunity under Georgia law is an immunity from suit rather than simply a defense to substantive liability." 963 F.2d at 340. After examining Georgia law, we concluded that "*a suit cannot be maintained* against the State without its consent." *Id.* Thus, we applied the collateral order doctrine and found jurisdiction. Likewise, to determine whether we have jurisdiction to entertain the tribal officers' appeal, we must ask a straightforward question: Does tribal sovereign immunity under federal law provide immunity from suit or is it merely a defense to liability? The Supreme Court has unequivocally answered this question, having held that, absent explicit congressional abrogation or a tribal waiver, tribal sovereign immunity provides an Indian tribe with immunity from suit. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Tribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial. Thus, under the *Mitchell* and *Griesel* analysis, the collateral order doctrine of *Cohen* is satisfied,

and we have jurisdiction to entertain the tribal officers' appeal. *See Seminole Tribe v. Florida,* 11 F.3d 1016, 1021 (11th Cir.1994) ("Our jurisdiction . . . arises from the district court's *denial* of defendants' motion to dismiss based on sovereign immunity; such a denial grants defendants the right of an immediate interlocutory appeal."), *cert. granted,* __ U.S. __, 115 S.Ct. 932, 130 L.Ed.2d 878 (1995).

b.

Having determined that we have jurisdiction to hear the tribal officers' appeal, we consider the district court's refusal to dismiss them from this suit. The district court rejected the tribal officers' claim of immunity under the doctrine of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See supra* section I.D. That doctrine, as the district court properly concluded, applies in suits brought against tribal authorities in their official capacities. *Santa Clara Pueblo,* 436 U.S. at 59, 98 S.Ct. at 1677; *see also Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 173, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977) ("[T]he [tribe's] successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction."); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community,* 991 F.2d 458, 460 (8th Cir.1993) ("*Ex Parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity."); *United States v. James,* 980 F.2d 1314, 1319 (9th Cir.1992) ("Tribal immunity does not extend to the individual members of the tribe."), *cert. denied,* __ U.S. __, 114 S.Ct. 119, 126 L.Ed.2d 84 (1993). Accordingly,

we affirm the district court's ruling that the individual defendants are not shielded by the Tribe's sovereign immunity.[72]

IV.

In conclusion, we DISMISS appeal No. 94-4403 for want of jurisdiction. In appeal No. 94-4578, we AFFIRM the district court's dismissal of Tamiami's claims against the Tribe, the Business Council, the Gaming Agency, and the Tribal Court. In appeal No. 94-4405, we AFFIRM the district court's order denying the individual defendants' motion to dismiss on grounds of sovereign immunity.

IT IS SO ORDERED.

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72. We do not reach the question whether, despite the individual defendants' amenability to suit, Tamiami can state a claim for relief against them. We have determined, in subsection III.B.1.b., that IGRA provides no right of action for Tamiami's suit against the Tribe. We note that the district court must answer a similar question with respect to Tamiami's claims against the tribal officers: If, as Tamiami argues, the tribal officers have violated the authority the Tribe is capable of granting them, can a cause of action against those officers be found, either implicitly or explicitly, in IGRA? *See infra* note 58.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ON DEFENDANTS' MOTIONS TO DISMISS DATED, DECIDED AND FILED FEBRUARY 28, 1994

TAMIAMI PARTNERS, LTD. by and through its general partner TAMIAMI DEVELOPMENT CORPORATION,

Plaintiff,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, BUSINESS COUNCIL OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, MICCOSUKEE TRIBAL GAMING AGENCY, MICCOSUKEE TRIBAL COURT, BILLY CYPRESS, JASPER NELSON, JIMMIE BERT, MAX BILLIE, HENRY BERT, ANDY BUSTER, and MINNIE BERT,

Defendants.

CASE NO. 92-0489-CIV-HIGHSMITH

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

* * *

February 28, 1994, Decided

February 28, 1994, FILED

* * *

Appendix D

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

THIS CAUSE came before the Court upon the following motions:

(1) Defendant Miccosukee Tribal Court's motion to dismiss the amended complaint; and

(2) Motion of Defendants Miccosukee Tribe of Indians of Florida, Miccosukee Business Council, Miccosukee Tribal Gaming Agency, Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, and Minnie Bert to dismiss the amended complaint.

For the reasons stated below, the Court grants the Miccosukee Tribal Court's motion to dismiss, and grants in part and denies in part the remaining defendants' motion to dismiss, as follows: the Court grants the motion as to Defendants Miccosukee Tribe of Indians of Florida, Miccosukee Business Council, and Miccosukee Tribal Gaming Agency; the Court denies the motion as to Defendants Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, and Minnie Bert.

PROCEDURAL AND FACTUAL BACKGROUND

On February 27, 1992, Plaintiff Tamiami Partners, Ltd. ("TPL"), a non-Indian entity, commenced this action with the filing of a verified complaint for equitable relief against the Miccosukee Tribe of Indians of Florida ("Tribe"). In 1989, the Tribe and TPL's predecessor in interest, Tamiami Development Corporation, had entered into a management

agreement for the operation of a bingo gaming facility, in accordance with the provisions of the Indian Gaming Regulatory Act ("IGRA"), *25 U.S.C. § 2701*, et seq. IGRA permits federally recognized Indian tribes, such as the Miccosukee Tribe, to establish gaming activities on their lands. *25 U.S.C.A. § 2710* (West Supp. Pamphlet 1993). The law also permits tribes to enter into management contracts for the operation of bingo and similar games. *25 U.S.C.A. § 2711* (West Supp. Pamphlet 1993).

Pursuant to these legislative provisions and the terms of the management agreement, Tamiami Development Corporation acquired a tract of land for the purpose of building a gaming hall and deeded such land to the United States in trust for the Tribe. At the time of the commencement of this action, TPL was operating the bingo gaming facility, known as Miccosukee Indian Bingo, which was built on the deeded land. The management agreement between TPL and the Tribe includes an arbitration provision for the settling of disputes and controversies arising from the agreement. In a separate provision of the agreement, the Tribe has consented to suit in the United States District Court for the Southern District of Florida, by waiving its sovereign immunity for the purpose of enforcing the terms of the agreement, should the Tribe fail to participate in arbitration or fail to abide by the terms of an arbitration award.

Notwithstanding these contract provisions, on January 28, 1992, the Tribe notified TPL that the management agreement would terminate in thirty days. In addition, on February 26, 1992, the Tribe filed a Statement of Claim in the Miccosukee Tribal Court, seeking declaratory and

injunctive relief in the form of an order declaring that the management agreement was terminated; directing the Tribe to assume control of the bingo operation; enjoining TPL from interfering with such assumption; and directing the tribal police to enforce the order. (Statement of Claim, Miccosukee Tribe of Indians of Florida v. Tamiami Partners, Ltd., Case No. CV. 92-07 (Miccosukee Court)). In the verified complaint filed before this Court, TPL sought a declaratory judgment that the Tribe was bound by the arbitration provisions of the management agreement. TPL also sought preliminary and injunctive relief ordering the Tribe to arbitrate and preventing the Tribe from assuming control of the bingo operation during the pendency of the arbitration proceedings.

Act I

From the outset, this action has been punctuated by emergency requests for relief from TPL. At the beginning of the litigation, TPL sought the immediate issuance of a preliminary injunction compelling arbitration and preventing the Tribe from impeding TPL's operation of the bingo games. On Friday, February 28, 1992, after conducting an emergency hearing, the Court issued a temporary restraining order maintaining the status quo. The following Monday, March 2, 1992, the Court resumed the emergency hearing. On March 5, 1992, the Court issued the first of three omnibus orders.

In that order, the Court addressed the issue of its jurisdiction over the action, which TPL had invoked in the verified complaint merely by referring to the federal question jurisdiction statute, *28 U.S.C. § 1331*. Because the Statement

of Claim filed in tribal court had been appended to TPL's verified complaint, the Court was cognizant of the pending tribal court action, and of the fact that such action was almost a mirror image of the one before the Court. Relying on *National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818 105 S. Ct. 2447 (1985),* the Court determined that the case before it presented a federal common law question; namely, the exercise of tribal court judicial power over non-Indians. The Court, however, chose to abstain from exercising such federal question jurisdiction by applying the doctrine of exhaustion of tribal remedies, as articulated in *Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987).* Accordingly, the Court vacated the March 2, 1992 temporary restraining order; denied TPL's motion for preliminary injunctive relief; and stayed the action pending the occurrence of any of the following three events: exhaustion of tribal remedies; exercise of self-help on the part of the Tribe to take over the bingo operation; or failure on the part of the Tribe to provide two business days' notice prior to taking any action pursuant to an order of the tribal court.

Act II

After the stay had been in effect for a little over four months, TPL returned before this Court on July 21, 1992, again seeking emergency injunctive relief. This time, TPL sought an order enjoining the Tribe from exercising self-help to terminate the management agreement. The basis for TPL's request was the sudden, mass denials of license applications submitted by TPL employees pursuant to the Tribe's licensing requirements. On Friday, July 24, 1992,

after conducting an emergency hearing, the Court lifted the stay of the action and granted TPL temporary injunctive relief pending its review of the licensing process. For purposes of this review, the Court held evidentiary hearings on August 4 and 5, 1992. Shortly thereafter, on August 19, 1992, the Court issued its second omnibus order.

In that order, the Court determined that the Tribe's licensing process was arbitrary and capricious. Nevertheless, after conducting a thorough review of the Indian Gaming Regulatory Act, under whose provisions the Tribe had enacted its licensing ordinance, the Court found no statutory grant of jurisdiction to review the licensing process undertaken by the Tribe. Additionally, the Court considered the Tribe's sovereign immunity from suit in the conduct of a governmental function such as licensing, in light of the United States Supreme Court's pronouncements in *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982)* and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)*. The Court found that the Tribe's narrow waiver of sovereign immunity contained in the management agreement did not extend to the licensing process. The Court concluded, therefore, that it lacked jurisdiction to grant the relief sought by TPL. Accordingly, the Court reinstated the stay of the action under the same terms that had been imposed in the first omnibus order.

Around the time of TPL's second request for federal court relief, the Miccosukee Tribal Court issued a ruling in the parallel case. In an order dated July 16, 1992 (a copy of

which TPL filed with the Court immediately upon receipt on July 23, 1992), the tribal court determined that it had jurisdiction over the dispute between TPL and the Tribe, directed the parties to initiate arbitration proceedings pursuant to the management agreement's arbitration clause, and retained jurisdiction over the action, pending the outcome of the arbitration proceedings.[1] On August 5, 1992, the Tribe filed a notice of compliance with the tribal court order and announced its intention to commence arbitration. In conformance with the tribal court order, TPL and the Tribe engaged in protracted arbitration proceedings.[2]

Notwithstanding the initiation of arbitration proceedings, on Friday, August 21, 1992, TPL sought leave from the Court to file a supplemental complaint. TPL's proposed supplemental complaint, also filed on August 21, 1992, sought an order requiring arbitration of the licensing dispute and enjoining the Tribe from utilizing the licensing process to impede TPL from operating the bingo games. Along with the motion seeking leave to supplement the complaint, TPL filed an emergency motion for a preliminary injunction granting the relief sought in the supplemental complaint. On

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1. The tribal court's memorandum opinion articulating its rationale for these rulings was issued on August 7, 1992. Miccosukee Tribe of Indians of Florida v. Tamiami Partners, Ltd., Case No. CV. 92-07 (Miccosukee Court, Aug. 7, 1992).

2. The proceedings culminated with an October 6, 1993 award and decision in favor of TPL issued by the TPL and neutral arbitrators, with the arbitrator appointed by the Tribe dissenting. The Court has not been informed of any further developments in this regard.

this occasion, however, the Court was not available to entertain TPL's emergency request. On Sunday, August 23, 1992, Hurricane Andrew struck South Florida. The destruction wreaked by the storm not only disrupted the Court's calendar, it also caused the temporary closing of the bingo games, thereby forcing a short-lived truce in the dispute between TPL and the Tribe. After a return to business, on September 15, 1992, the Court denied TPL's motion for leave to supplement the complaint and denied TPL's emergency motion for preliminary injunction. On September 17, 1992, TPL filed an interlocutory appeal of the Court's ruling in the second omnibus order and the Court's denial of the motion for leave to supplement the complaint and the emergency motion for preliminary injunction.

Act III

After a lull in the proceedings, TPL returned before the Court on April 13, 1993, seeking an emergency order enjoining the Tribe from exercising self-help. TPL's request was prompted by the following actions on the part of the Tribe and its instrumentalities, all of which had occurred on that same day: the Tribe's denial of the gaming license applications submitted by TPL and by its principals, Cye Mandel and John Sisto; the Miccosukee Tribal Gaming Agency's issuance of an order appointing Kenneth Welt as conservator of the bingo operation and directing him to take control of the same; and the Miccosukee Tribal Court's issuance of an order in aid of enforcement of the gaming agency's order. Pursuant to these decrees, the Tribe immediately ordered Mandel and Sisto to leave the bingo hall; ordered the Miccosukee Indian Bingo accountant to turn

over the bingo operation records to the conservator; and sought control of the bingo operation's bank accounts.[3]

At the conclusion of an emergency hearing held on April 15, 1993, the Court issued its third omnibus order, finding that the tribal court had exceeded its jurisdiction when it issued the order appointing the conservator, thereby rendering said order null and void.[4] The Court also found that the Tribe's licensing denials had been effected under the guise of its sovereign powers to, for all practical purposes, abrogate the management agreement which was still the subject of arbitration proceedings. The Court, therefore, declared all actions taken by the Tribe and its instrumentalities null and void; and ordered the parties to return to the status quo as it existed on April 12, 1993 and to preserve such status during the pendency of the ongoing arbitration proceedings. Pursuant to the Court's certification under *28 U.S.C. § 1292(b)*, the Tribe and the conservator immediately filed interlocutory appeals.[5]

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3. The Tribe had to obtain a state court order requiring the bank to turn over the accounts before gaining control of the funds.

4. Although the tribal court order was entitled "Order in Aid of Enforcement of Tribal Gaming Agency's Order Appointing Conservator," the order stated, inter alia, "It is the intent of this Court in appointing a Conservator to fulfill the obligations of the Tribe under the Indian Gaming Regulatory Act and tribal law, as well as to preserve and protect [Miccosukee Indian Bingo] as an ongoing business operation." In re Conservatorship for Miccosukee Indian Bingo, Case No. CV. 93-11 (Miccosukee Court, Apr. 13, 1993).

5. Upon the Tribe's refusal to comply with the Court's April 15, 1993 order, the Court found the Tribe in civil contempt after a

(Cont'd)

Appendix D

Intermission: The Appeal

On April 21, 1993, the Eleventh Circuit consolidated the three pending appeals in this action and prescribed an expedited briefing schedule. On August 16, 1993, the Eleventh Circuit issued its opinion on the consolidated appeals, reversing the undersigned's orders for lack of subject matter jurisdiction under the well-pleaded complaint rule. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 999 F.2d 503, 508-09 (11th Cir. 1993).* "According to the well-pleaded complaint rule, federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Tamiami Partners, 999 F.2d at 507* (citations omitted).

In the view of the Eleventh Circuit, "Under *28 U.S.C. § 1331,* the district court only had subject matter jurisdiction to hear challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions." *Id. at 508* (citing *National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)).*[6] After reviewing the verified complaint and the proposed

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(Cont'd)
hearing held on April 20, 1993. The following day, however, the Eleventh Circuit stayed the Court's third omnibus order during the pendency of the appeals, and directed the clerk to expedite these appeals.

6. The Court notes that this is the precedent upon which it relied for its finding of federal question jurisdiction in the first omnibus order.

supplemental complaint, the Eleventh Circuit determined that these pleadings did not present such a federal question, but, merely, a breach of contract claim. Similarly, the Eleventh Circuit found no federal question contained in TPL's emergency motions for injunctive relief filed on February 27, 1992, July 21, 1992, and August 21, 1992. The Eleventh Circuit found, however, that two of TPL's legal memoranda, which were filed in the Court record on September 16, 1992, presented, for the first time, a federal question.[7]

In light of these findings, the Eleventh Circuit stated:

> Now that we have reviewed the record in this case, we are aware that when the court entered the third order on August 21, 1992, events had occurred and evidence was in the record that suggested a basis for district court jurisdiction. The district court did not have jurisdiction, however, because although the evidence was present, neither the complaint nor the

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7. A close review of the Court record reveals that these pleadings, although file-stamped September 16, 1992, relate to earlier proceedings before the Court. TPL's reply memorandum in support of motion for preliminary injunction (D.E. # 60A), bearing a service date of March 2, 1992, pertains to TPL's first request for injunctive relief, which the Court addressed in the first omnibus order. TPL's supplemental memorandum in support of its motion for injunctive relief (D.E. # 59), bearing a service date of August 8, 1992, pertains to TPL's second request for injunctive relief, which the Court addressed in its second omnibus order. Due to the emergency nature of the proceedings, and the voluminous filings by the parties, some documents did not become incorporated into the Court record until well after the associated hearings.

> supplemental complaint had sufficient allegations to meet the standard for district court jurisdiction. Because we are now aware of facts which suggest that the district court could have jurisdiction if the case arose today, we remand the case to the district court with directions that the district court dismiss this action unless one of the present parties files a complaint or other pleading which properly alleges jurisdiction. If such a complaint or petition is filed within thirty days of the date of remand, the district court shall proceed to frame and determine the issues in the usual manner.

Tamiami Partners, 999 F.2d at 508 (emphasis added).

The Court does not mind noting that the italicized portion of this passage of the Eleventh Circuit's opinion has made the Court's task on remand more difficult than would ordinarily be expected. As can be gleaned from the foregoing review of the proceedings prior to appeal, the Court did not enter any order on August 21, 1992. The Court entered the second omnibus order on August 19, 1992, and the third omnibus order on April 15, 1993. Therefore, the Eleventh Circuit's reference to the Court's entry of the third order on August 21, 1992 creates an ambiguity concerning which facts in the record would support federal question jurisdiction.

At a status conference held on October 26, 1993, the Court sought counsel's assistance in resolving this uncertainty. As might be expected, counsel for TPL and for the Tribe proposed differing interpretations of this reference. According to counsel for TPL, the passage's mention of the

third order clearly refers to the third omnibus order, dated April 15, 1993, and the reference to August 21, 1992 is merely a deviation in the chronology. (Transcript of Status Hearing on October 26, 1993, at 5.) According to counsel for the Tribe, however, the Court should disregard the reference to the third order and focus on the Eleventh Circuit's earlier, explicit reference to September 16, 1992 as the first date in the record where it found indicia of federal question jurisdiction. (Transcript of Status Hearing on October 26, 1993, at 15.) The Court finds no assistance in either side's interpretation. As previously noted, the legal memoranda filed in the Court record on September 16, 1992 actually pertain to earlier proceedings. Because the Eleventh Circuit found the indicia of jurisdiction in these memoranda, the Court concludes that jurisdictional facts were present before the Court as of the earliest service date of these pleadings; namely, March 2, 1992.

Act IV

Pursuant to the Eleventh Circuit's instructions, TPL filed an amended complaint on September 14, 1993. In the amended complaint, TPL asserts claims not only against the Tribe itself, but also against its various agencies and instrumentalities; namely, the business council, the gaming agency, and the tribal court. In addition, TPL asserts claims against the various individuals who hold offices within such organizations.[8] The amended complaint recounts all of the

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8. The amended complaint also named the conservator as a defendant. On October 12, 1993, however, the tribal gaming agency

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events in this litigation, and prays for declaratory and injunctive relief. It seeks declaratory relief in the form of an order adjudging that the defendants exceeded their jurisdiction and sovereign powers in their actions toward TPL and the bingo operation. It seeks injunctive relief in the form of an order declaring null and void the April 13, 1993 orders issued by the gaming agency and the tribal court, and requiring the Tribe, the gaming agency and the conservator to turn over to TPL its share of revenues pursuant to the agreement, as well as a $50,000 advance made by TPL to the Tribe in April 1993.

To cure its prior failure to comply with the well-pleaded complaint rule, TPL included in the amended complaint the following issues as predicates for the Court's federal question jurisdiction under *28 U.S.C. § 1331*:

> (1) Whether the Tribe's actions in effectively abrogating the management agreement (in purported furtherance of its governmental purposes through its legislative, regulatory, and judicial bodies) exceeded the Tribe's sovereign powers, violated IGRA, or violated the Commerce Clause?

(Cont'd)
issued an order terminating the conservatorship and requiring the conservator to turn over to the Tribe custody and control of the conservatorship res. Therefore, pursuant to TPL's motion, the Court dismissed the conservator from this action at the status hearing held on October 26, 1993.

(2) Whether the Tribe's actions in denying gaming licenses to TPL and its principals, and subsequently evicting them from the gaming facility without affording them due process (again, by acting through the Tribe's legislative, regulatory, and judicial bodies) exceeded the Tribe's sovereign powers, violated IGRA, or violated the Commerce Clause?

(3) Whether the individual defendants acted beyond the authority that the Tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes?

(4) Whether the tribal court or its judges exceeded their jurisdiction or sovereign powers:

— in asserting jurisdiction over the disputes between the Tribe and TPL?

— by issuing the order in aid of jurisdiction, dated April 13, 1993, which resulted in TPL's eviction, the installation of the conservator, and the conservator's withholding of TPL's share of its income under the management agreement, all without prior notice or post-eviction opportunity to be heard?

In response to the amended complaint, all of the defendants have moved for dismissal. The tribal court seeks dismissal for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted. In

a separate motion, the remaining defendants seek dismissal for lack of subject matter jurisdiction and further argue that the amended complaint is barred by sovereign immunity as to them.[9]

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

Fed.R.Civ.P. 12(b)(1) permits the presentation, by way of motion, of the defense of lack of jurisdiction over the subject matter. "A motion to dismiss for lack of jurisdiction may be decided by the district court on one of three bases: the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ynclan v. Department of Air Force, 943 F.2d 1388, 1390 (5th Cir. 1991)* (citing *Williamson v. Tucker, 645 F.2d 404, 413* (5th Cir.), cert. denied, *454 U.S. 897, 70 L. Ed. 2d 212, 102 S. Ct. 396 (1981)).*

Fed.R.Civ.P. 12(b)(6) permits the presentation, by way of motion, of the defense of failure to state a claim upon which relief can be granted. To state a claim, Fed.R.Civ.P.

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9. The Court notes that each of the two motions contains a statement incorporating by reference the other motion's arguments. The Court, however, declines such a sweeping invitation to extrapolate beyond the contents of each motion. In particular, the Court notes that the tribal court did not explicitly raise the issue of sovereign immunity in its motion to dismiss. Moreover, the United States Supreme Court in National Farmers Union makes no mention of sovereign immunity in the context of challenges to tribal court jurisdiction. The Court, therefore, does not consider the issue of sovereign immunity as to the tribal court.

8(a) requires, inter alia, "a short and plain statement of the claim showing that the pleader is entitled to relief." The court must "take the material allegations of the complaint and its incorporated exhibits as true, and liberally construe the complaint in favor of the Plaintiff." *Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797, 798 (11th Cir. 1988)*, aff'd sub nom, *Zinermon v. Burch, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990)*. The law in this Circuit is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988)*, cert. denied sub nom, *Peat Marwick Main & Co. v. Tew, 486 U.S. 1055, 100 L. Ed. 2d 923, 108 S. Ct. 2822 (1988)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99, 101-102 (1957))*. The moving party bears a heavy burden. *St. Joseph's Hosp., Inc. v. Hospital Corp. of America, 795 F.2d 948, 953*, reh'g denied, *801 F.2d 404 (11th Cir. 1986)*.

DISCUSSION

The Court first addresses the tribal court's motion to dismiss, which relies upon two grounds: lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1); and failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). After considering these issues, the Court addresses the remaining defendants' motion to dismiss for lack of subject matter jurisdiction, pursuant

to Fed.R.Civ.P. 12(b)(1), and these defendants' invocation of sovereign immunity as a bar to the Court's jurisdiction.

1. The tribal court's motion to dismiss for lack of subject matter jurisdiction.

In its motion to dismiss, the tribal court concedes that the following issue raised in the amended complaint properly presents a federal question: Whether the tribal court or its judges exceeded their jurisdiction or sovereign powers in asserting jurisdiction over the disputes between the Tribe and TPL?

The tribal court cannot take a contrary position in light of the Eleventh Circuit's recognition that such an issue supports federal court jurisdiction under the Supreme Court's holding in *National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)*. Moreover, the Eleventh Circuit has indicated that the facts in the record of this litigation would support the Court's assertion of federal question jurisdiction if such facts were alleged in a well-pleaded complaint. As previously discussed, the Eleventh Circuit found such indicia in legal memoranda submitted by TPL as early as March 2, 1992 and August 8, 1992 (but file-stamped on September 16, 1992). In those documents, TPL challenged the tribal court's assertion of jurisdiction over it in the case brought by the Tribe against TPL in tribal court, Miccosukee Tribe of Indians of Florida v. Tamiami Partners, Ltd., Case No. CV. 92-07 (Miccosukee Court). Therefore, the Court concludes that TPL has properly alleged a basis for this Court's assertion of federal question jurisdiction in this action;

namely, the exercise of tribal court judicial power over TPL, a non-Indian entity. *National Farmers Union, 471 U.S. at 852* ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331.").

The tribal court argues, however, that the Court lacks subject matter jurisdiction to address the companion "National Farmers Union" issue raised by TPL; i.e., whether the tribal court or its judges exceeded their jurisdiction or sovereign powers by issuing the order in aid of jurisdiction, dated April 13, 1993, which resulted in TPL's eviction, the installation of the conservator, and the conservator's withholding of TPL's share of its income under the management agreement, all without prior notice or post-eviction opportunity to be heard?

The tribal court advances the following arguments in support of its posture that the Court lacks jurisdiction over this question: first, the order in aid of enforcement issued by the tribal court on April 13, 1993 was merely supplemental to the tribal gaming agency's concurrent order; second, nothing would change even if the tribal court were to vacate this order because the operative order was the one issued by the tribal gaming agency; and, finally, the tribal court has already vacated the order.[10]

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10. The tribal court's order of October 12, 1993, vacating and withdrawing its order in aid of enforcement, is attached as Exhibit

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The Court fails to see how these arguments bear upon the Court's recognized federal question jurisdiction over challenges to the assertion of tribal court judicial power over non-Indians. The tribal court cannot now seriously dispute that it asserted judicial power over TPL through the issuance of the order in aid of enforcement on April 13, 1993. Despite post-hoc interpretations advanced by the tribal court, the order explicitly states that the tribal court was appointing a "Conservator to fulfill the obligations of the Tribe under the Indian Gaming Regulatory Act and tribal law, as well as to preserve and protect [Miccosukee Indian Bingo] as an ongoing business operation." In re Conservatorship for Miccosukee Indian Bingo, Case No. CV. 93-11 (Miccosukee Court, Apr. 13, 1993). The appointment of the conservator resulted in the ouster of TPL from Miccosukee Indian Bingo, and that ouster remains in effect.[11] Therefore, the Court concludes that TPL has properly alleged the jurisdictional

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B to the defendants' opposition to TPL's motion for preliminary injunction (D.E. # 144). The order bears Case No. CV. 92-07, rather than Case No. CV. 93-11, under which the original order in aid of enforcement was issued. At the status hearing held by the undersigned on October 26, 1993, however, counsel for the defendants stated that this was merely a scrivener's error, and that the vacating order should have properly issued under Case No. CV. 93-11. (Transcript of Status Hearing on October 26, 1993, at 39-40.)

11. With the tribal gaming agency's termination of the conservatorship on the same day that the tribal court issued the order vacating its order in aid of jurisdiction, the Tribe assumed direct control over Miccosukee Indian Bingo.

predicate for this Court's exercise of federal question jurisdiction over all of the tribal court's actions vis-a-vis TPL.

2. The tribal court's motion to dismiss for failure to state a claim upon which relief can be granted.

(i). As to the tribal court's assertion of jurisdiction in Case No. CV. 92-07:

The tribal court argues that the amended complaint does not state a claim for relief because its assertion of jurisdiction over the disputes between TPL and the Tribe in Case No. CV. 92-07 is correct, leaving nothing for this Court to determine. As noted by the Eleventh Circuit, this Court has subject matter jurisdiction to "hear challenges to the tribal court's jurisdiction after a full opportunity for the tribal court determination of jurisdictional questions." *Tamiami Partners, 999 F.2d at 508* (citing *National Farmers Union, 471 U.S. at 856-57*. The Eleventh Circuit added, "The tribal court's determination [of jurisdictional questions] is ultimately subject to review in the district court, but unless the federal court determines that the tribal court lacked jurisdiction, the federal court must defer to the tribal court and cannot allow relitigation of the issues resolved in the tribal court." *Tamiami Partners, 999 F.2d at 508 n.12* (citing *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987)*. This pronouncement stems from the doctrine of exhaustion of tribal remedies, which the Court applied in its first omnibus order.

According to the tribal court, TPL has not exhausted its tribal remedies in Case No. CV. 92-07 because it failed to

raise federal law as a bar to tribal court jurisdiction in the tribal court proceedings.[12] The tribal court's memorandum opinion dated August 7, 1992, however, fully addresses the issue of its jurisdiction over TPL, the non-Indian defendant, from both federal law and tribal code perspectives. The Court concludes, therefore, that the tribal court has had a full opportunity to address the jurisdictional questions in Case No. CV. 92-07, thereby rendering the matter subject to federal court review.

(ii). As to the tribal court's assertion of jurisdiction in Case No. CV. 93-11:

These proceedings in tribal court were limited to the issuance of the tribal court order in aid of enforcement on April 13, 1993, which was subsequently vacated and withdrawn on October 12, 1993. These orders were entered without prior notice to TPL, making it impossible for TPL to exhaust tribal remedies by challenging the tribal court's jurisdiction in tribal court.[13] Unlike the case addressing the contract dispute between TPL and the Tribe, therefore, the issue of the tribal court's jurisdiction was not explored by

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12. In seeking dismissal of the tribal court action, TPL argued that the tribal court could not exercise jurisdiction over non-Indians under the provisions of the Miccosukee Code.

13. At the status hearing held on October 26, 1993, counsel for the defendants informed the Court that the order of April 13, 1993 was entered pursuant to a request from the conservator and vacated pursuant to an application on the part of the tribal gaming agency. (Transcript of Status Hearing on October 26, 1993, at 33 & 36-37.)

the tribal court with regard to this case. Nevertheless, exhaustion of tribal remedies has now been foreclosed by the tribal court's effective termination of this action. Therefore, the Court need not apply the doctrine of exhaustion of tribal remedies as to this action. This renders the matter subject to federal court review.

3. Mootness

The Tribe and its instrumentalities, however, have short-circuited the Court's consideration of these issues. As to Case No. CV. 92-07, the Tribe voluntarily dismissed the action on October 25, 1993. (Exhibit A to the defendants' opposition to TPL's motion for preliminary injunction, D.E. # 144.) Pursuant to the Tribe's voluntary dismissal, the tribal court is no longer asserting jurisdiction over TPL in that action. Moreover, the only exercise of the tribal court's jurisdiction over TPL in that case was through the order of July 12, 1992 compelling arbitration, and those proceedings are no longer ongoing. Similarly, as to Case No. CV. 93-11, the Court and the parties know that an adjudication of the tribal court's jurisdiction would rise to nothing more than an exercise in futility. Were the Court to declare the tribal court's order in aid of enforcement null and void for lack of jurisdiction, as it did in its third omnibus order, the Tribe would continue to assert control over Miccosukee Indian Bingo under the guise of the tribal gaming agency's authority. Indeed, the tribal gaming agency's request that the tribal court vacate its April 13, 1993 order makes this clear.[14]

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14. At the status hearing held on October 26, 1993, the Court asked counsel for TPL his position on precisely this issue. The Court

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The Court concludes, therefore, that the issue of the tribal court's jurisdiction over TPL has been rendered moot by the termination of the tribal court proceedings, thereby requiring dismissal of this portion of the amended complaint under the "case or controversies" requirement of Article III of the United States Constitution. Accordingly, the Court grants the tribal court's motion to dismiss.

4. The remaining defendants' motion to dismiss for lack of subject matter jurisdiction:

The remaining defendants have filed a separate motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1). These defendants argue that the Court's federal question jurisdiction is circumscribed to a review of tribal judicial power. Accordingly, they seek outright dismissal of all aspects of the amended complaint that do not challenge tribal court jurisdiction. A review of the case law does not support this narrow construction of federal question jurisdiction over exercises of tribal sovereign powers.

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asked Mr. Bohrer, "If I find only that I have authority to simply review the exercise of jurisdiction by the tribal court, isn't this all a moot issue now?" Mr. Bohrer responded, "If that's the only jurisdiction you have, Your Honor, then that jurisdiction is, to some extent, gone." Mr. Bohrer added, "By vacating [the order], it's as if it didn't happen and my client should be able to walk back in. We all know that's not going happen." (Transcript of Status Hearing on October 26, 1993, at 58-60.)

Appendix D

Initially, the Court notes that National Farmers Union stands for the proposition that the exercise of tribal judicial power over non-Indians presents a federal common law question, not the only federal common law question in this area. In the case below, *National Farmers Union Ins. Co. v. Crow Tribe of Indians, 736 F.2d 1320 (9th Cir. 1984)*, the Ninth Circuit recognized that challenges to tribal exercise of regulatory powers could state a claim arising under federal common law but concluded that challenges to tribal exercise of adjudicatory powers failed to state a federal question. *Id. at 1323*. The Supreme Court reversed, stating that challenges to tribal court jurisdiction did state a federal question. *National Farmers Union, 471 U.S. at 857.*

Numerous other federal cases involve similar challenges to tribal regulatory and/or legislative powers over non-Indians. See e.g., *Montana v. United States, 450 U.S. 544, 547, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)* (challenge to an Indian tribe's power to regulate hunting and fishing by non-Indians on reservation lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 414, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989)* (challenge to imposition of zoning and land use tribal laws on non-members); *Native Village of Tyonek v. Puckett, 957 F.2d 631, 634 (9th Cir. 1992)* (challenge to application of tribal ordinances to non-members); *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077-79 (9th Cir. 1990)* (same); *Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1473-75 (9th Cir. 1989)* (same); *Cardin v. De La Cruz, 671 F.2d 363, 365* (9th Cir.), cert. denied, *459 U.S. 967, 74 L. Ed. 2d 277, 103 S. Ct. 293 (1982)* (challenge to tribal regulation of a business); *Middlemist v. Secretary, Dept. of*

Interior, 824 F. Supp. 940, 943 (D. Mont. 1993) (challenge to application of tribal conservation laws to non-members). The Court concludes that TPL's amended complaint states a federal common law question as to the non tribal-court defendants; namely, whether these defendants exceeded tribal powers in their actions towards TPL.

5. Sovereign immunity:

The Court's jurisdictional inquiry as to these defendants does not end, however, with a finding of subject matter jurisdiction. A "plaintiff challenging tribal power in federal court must show: (1) a federal cause of action; and (2) a waiver of tribal sovereign immunity. If these two elements can be shown to exist, then *42 U.S.C. § 1331* provides a federal forum." K. Gover & R. Laurence Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act, *8 Hamline L. Rev. 497, 516 (1985)*. The relationship between subject matter jurisdiction and sovereign immunity is as follows:

> Strictly speaking, . . . the immunity defense available to the sovereign does not necessarily present, and should not be confused with the question of subject matter jurisdiction (citations omitted). The district court may have the power to adjudicate a claim against the sovereign under its general federal question jurisdiction, just as the court might equally have jurisdiction in an action against any other legal entity; but the court must find that such claim is not viable unless the

> sovereign has consented to be sued in that court in the same manner as another legal entity. Conversely, the sovereign may consent to be sued in a given case, but the district court may lack subject matter jurisdiction over the otherwise viable claim if no substantial federal question is presented, diversity is wanting, and no other statutory jurisdictional predicate is applicable.

Homewood Corp. v. Kemp, 786 F. Supp. 1315, 1317 (S.D. Ohio 1992) (quoting *Brewer v. Department of Housing & Urban Dev., 508 F. Supp. 72, 75 (S.D. Ohio 1980)).*

(i). As to the Tribe and its agencies:

The United States Supreme Court has unequivocally found that Indian tribes possess sovereign immunity from suit. "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991).* "A waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed." *Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1171 (10th Cir. 1992)* (citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)).* "An Indian tribe's immunity from suit extends to suits for declaratory and injunctive relief." *Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991)* (citing *Santa*

Clara Pueblo, 436 U.S. at 58). Taking into consideration the Tribe's cloak of sovereign immunity helps elucidate the Eleventh Circuit's statement that, "Under *28 U.S.C. § 1331*, the district court only had subject matter jurisdiction to hear challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions." *Tamiami Partners, 999 F.2d at 508* (emphasis added). Indeed, the Eleventh Circuit made this pronouncement at the conclusion of a discussion regarding the Tribe's sovereign immunity.[15]

The Court concludes, therefore, that the Tribe's sovereign immunity shields it from the allegations in the amended complaint regarding the exertion of tribal power as to TPL. Moreover, the Tribe's sovereign immunity extends to the tribal business council and tribal gaming agency. *Weeks Construction, Inc. v. Oglala Sioux Housing Auth., 797 F.2d 668, 670-71 (8th Cir. 1986)*. Therefore, the Court must dismiss the amended complaint as to the Tribe, the Miccosukee Business Council and the Miccosukee Tribal Gaming Agency. The Court recognizes the exception carved by the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682* (10th Cir.), cert. denied, *449 U.S. 1118, 66 L. Ed. 2d 847, 101 S. Ct. 931 (1980)*, for asserting federal jurisdiction in cases involving non-Indians, where no other forum is available. The Tenth Circuit has narrowly construed this exception to situations where

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15. The difficulties encountered by plaintiffs seeking redress from Indian tribes has been the focus of recent Congressional debate. For an up to date review of these efforts, see V. Limas, Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights, *70 Denv. U. L. Rev. 359, 387-89 (1993)*.

plaintiff's rights have been egregiously violated and tribal remedies were wrongfully denied to plaintiffs. *Seneca Cayuga Tribe of Oklahoma v. State ex rel. Thompson, 874 F.2d 709, 715 n.6 (10th Cir. 1989).* TPL argues that the circumstances in this case are clearly comparable to the egregious conduct and denial of tribal remedies present in Dry Creek. The Eleventh Circuit, however, was cognizant of the facts in this case when it made the foregoing statement regarding the Court's only basis for assertion of jurisdiction. The Court concludes, therefore, that the Eleventh Circuit would not contemplate application of the Dry Creek exception to this case.[16]

(ii). As to the individual defendants:

Sovereign immunity does not necessarily extend to the named tribal officers. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 912, 112 L. Ed. 2d 1112 (1991)* ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.") (citing *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441*

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16. Indeed, in a recent opinion involving a case brought by the Seminole Tribe of Florida against the State of Florida, in which the state asserted the sovereign immunity defense, the Eleventh Circuit stated, "The need for a forum, however, does not provide a federal court with the power to override state officials' constitutionally mandated sovereign immunity. Federal court jurisdiction is subject to and limited by the dictates of the Eleventh Amendment, and one judge's desire to give an aggrieved party a remedy does not enlarge it." *Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1028 n.14 (11th Cir. 1994).*

(1908)); *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)* (A tribal officer is not protected by the tribe's immunity from suit.) See also *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 460 (8th Cir. 1993)* (Ex parte Young applies to the sovereign immunity of Indian tribes.); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma, 725 F.2d 572, 574-75 (10th Cir. 1984)* (Tribal officials were not protected by the Tribes's immunity.); Gover & Laurence, supra at 517 ("[T]he Martinez citation to Ex parte Young should allow the suit against a tribal official to proceed to the merits of whether the tribal official is acting inconsistently with federal law in performing the acts involved in the challenged tribal power.")

The amended complaint alleges that the named tribal officers have acted beyond the authority that the Tribe is capable of bestowing upon them under federal [illegible]s defining the sovereign powers of Indian tribes. Taking the facts alleged in the amended complaint as true, in accordance with the standard for motions to dismiss, leads the Court to the conclusion that the defense of sovereign immunity does not require dismissal of the amended complaint as to Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, and Minnie Bert.

6. Exhaustion of tribal remedies as to claims against tribal officers:

In National Farmers Union, the Supreme Court explicitly made the exhaustion of tribal remedies doctrine applicable to a suit challenging tribal court jurisdiction. *National*

Farmers Union, 471 U.S. at 857. The Supreme Court articulated three exceptions to the exhaustion requirement: (1) where the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; and (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Id. at 857 n.21.* Courts have applied the exhaustion requirement, conditioned upon the applicability of the National Farmers Union exceptions, to suits challenging the actions of tribal officers. In *Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 517-18 (D. Kan. 1993),* the District of Kansas applied the exhaustion doctrine to dismiss a suit against the six members of a tribal council. The Kansas court considered, and rejected, the plaintiff's proffered reliance upon the National Farmers Union exceptions. *Id. at 518.* In *Superior Oil Co. v. United States, 798 F.2d 1324, 1331 (10th Cir. 1986),* the Tenth Circuit similarly applied the National Farmers Union exhaustion requirement and instructed the district court "to undertake such further proceedings deemed necessary to determine whether the actions of the Navajo Tribe of Indians and the named individual Navajo defendants . . . were taken in bad faith or motivated by a desire to harass such as to render exhaustion of Navajo Tribal Court remedies futile."

In its amended complaint, TPL invokes the National Farmers Union exceptions to support its argument that it need not exhaust tribal remedies. In particular, TPL asserts the bad faith exception articulated in National Farmers Union. TPL further asks the Court to rely on the existing record to verify the validity of its posture. For the present purposes,

however, the Court need only take as true TPL's allegations of bad faith on the part of the Tribe. Taking such allegations as true, the Court must reject the tribal officers' contention that the amended complaint should be dismissed as to them for failure to exhaust tribal remedies. Accordingly, the Court concludes that TPL's action shall proceed as to the named tribal officers.

CONCLUSION

Based on the foregoing considerations, it is hereby ORDERED AND ADJUDGED that:

(1) The Miccosukee Tribal Court's motion to dismiss the amended complaint is GRANTED.

(2) The motion of the Miccosukee Tribe of Indians of Florida, Miccosukee Business Council, Miccosukee Tribal Gaming Agency, Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, Henry Bert, Andy Buster, and Minnie Bert to dismiss the amended complaint is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED as to the Miccosukee Tribe of Indians of Florida; the Miccosukee Business Council; and the Miccosukee Tribal Gaming Agency. The motion is DENIED as to Billy Cypress; Jasper Nelson; Jimmie Bert; Max Billie; Henry Bert; Andy Buster; and Minnie Bert.

(3) This action be and the same is hereby DISMISSED with prejudice as to Defendants Miccosukee Tribal Court; Miccosukee Tribe of Indians of Florida; Miccosukee Business Council; and Miccosukee Tribal Gaming Agency.

Appendix D

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 28th day of February, 1994.

SHELBY HIGHSMITH

UNITED STATES DISTRICT JUDGE

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 16, 1993

TAMIAMI PARTNERS, LIMITED,

Plaintiff-Appellant,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendant-Appellee.

TAMIAMI PARTNERS, LIMITED,

Plaintiff-Appellee,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendant-Appellant,

Kenneth Welt, Conservator,

Movant-Appellant.

TAMIAMI PARTNERS, LIMITED,

Plaintiff-Appellee,

v.

Appendix E

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendant-Appellant.

Nos. 92-4869, 93-4375 and 93-4410.

United States Court of Appeals,
Eleventh Circuit.

Aug. 16, 1993.

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT, Circuit Judge, RONEY*, Senior Circuit Judge, and ATKINS**, Senior District Judge.

HATCHETT, Circuit Judge:

In this lawsuit involving a contract dispute between Indians and non-Indians on Indian lands, we hold that the district court did not have subject matter jurisdiction.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix E

I. FACTS

The Miccosukee Tribe of Indians of Florida (Tribe), a federally recognized Indian tribe, was organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.*, to define the powers of Indian tribes in conducting and regulating gaming on Indian land. In May, 1989, Tamiami Partners, Ltd. (TPL), a Florida limited partnership involved in gaming activities, was organized and Tamiami Development Corporation (TDC) was its sole general partner.

On April 7, 1989, the Tribe and TDC entered into a Management and Economic Development Agreement (agreement) for the purpose of operating a Class II gaming enterprise pursuant to the IGRA.[1] The Tribe owned the land, and TDC managed the gaming enterprise. In February, 1990, after TDC assigned its rights under the agreement to TPL, TPL spent approximately $6.5 million to acquire land that became part of the Miccosukee Indian Reservation, built the bingo hall, and began business in September, 1990.

In 1991, the Tribe and TPL began having disputes over the gaming operation. Due to these disputes, on January 28, 1992, the Tribe sent TPL a notice of its intent to terminate the agreement on February 28, 1992. On February 4, 1992, in a response, TPL disputed the Tribe's grounds for

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1. Class II gaming includes bingo and card games. 25 U.S.C. § 2703(7). Class II gaming on reservations is within the jurisdiction of the Indian Tribes, subject to the provisions of the IGRA. 25 U.S.C. § 2710(a)(2).

termination. On February 11, 1992, the Tribe acknowledged receipt of TPL's response, but reasserted the termination of the agreement effective February 28, 1992. On February 25, 1992, TPL formally demanded arbitration to determine the validity of the Tribe's termination notice, pursuant to article 12 of the parties' agreement.[2] Additionally, TPL requested that the Tribe respond to its arbitration demand by noon, February 26, 1992, and indicated that, without a response, it would assume the Tribe's reply to be negative. The Tribe did not respond, but filed a "Statement of Claim" in Miccosukee Tribal Court.[3] On February 27, 1992, TPL filed a verified complaint in the United States District Court, Southern District of Florida.[4]

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2. Article 12.1 of the agreement provided: "All disputes, controversies and/or claims arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration, as set forth in this article 12."

3. The Tribe's "Statement of Claim" is an action for declaratory and injunctive relief, praying for an order declaring that the agreement is terminated, directing that the tribe assume control of the enterprise, enjoining TPL from interfering with such assumption, directing tribal police to enforce the order, and granting attorney's fees and costs.

4. TPL's verified complaint prayed for the entry of a declaratory judgment and injunction, holding the Tribe bound under the agreement's arbitration clause, compelling arbitration, and enjoining the tribe from taking any action to seize or assume control of the enterprise pending arbitration.

Appendix E

II. PROCEDURAL HISTORY

On February 28, 1992, the district court held a hearing on TPL's motion for a preliminary injunction to compel arbitration. Because the district court recessed the hearing until March 2, 1992, it issued a temporary restraining order maintaining the status quo of the parties. On March 5, 1992, the district court entered its first omnibus order, finding that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to determine the extent of tribal court jurisdiction over non-Indians.[5] The district court acknowledged the Tribe's sovereign immunity, but determined that the Tribe had waived its sovereign immunity in article 23 of the agreement.[6] Thus, the district court vacated its previously

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5. Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

6. Article 23 of the agreement states:

> The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events: (i) Owner [Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12 [the arbitration clause], or (ii) failure by Owner to abide by the terms of an arbitration award. . . . This waiver of sovereign immunity shall not become effective until manager [TPL] has given notice to the Miccosukee Tribal Business Council, detailing the nature of the complaint and the Owner shall have failed after thirty days following such notice to cure such complaint.

entered temporary restraining order, denied TPL's motion for a preliminary injunction, and denied the Tribe's motion to dismiss. The district court also stayed any further proceedings until (1) tribal remedies were exhausted, (2) the Tribe used self-help, or (3) the Tribe failed to give at least two business days' notice of taking action pursuant to the tribal court order. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 788 F.Supp. 566 (S.D.Fla.1992) (*TPL I*).

On July 16, 1992, the Miccosukee Tribal Court entered an order directing the parties to arbitrate the commercial disputes and reserved jurisdiction to hear matters not covered under the arbitration clause. *Miccosukee Tribe of Indians v. Tamiami Partners, Ltd.,* No. CV 92-07 (Miccosukee Tribal Court, July 16, 1992). During this period, the Tribe denied approximately seventeen gaming license applications and approved sixteen license applications pursuant to a Tribe ordinance regarding licensing gaming personnel. TPL considered the Tribe's licensing denials to be a form of self-help. Thus, on July 21, 1992, TPL filed in the district court an emergency motion seeking injunctive relief to prohibit the Miccosukee Tribal Gaming Agency (Agency) from further denying licenses of key employees and to compel the Tribe to arbitrate licensing issues.[7]

After a hearing on July 24, 1992, the district court issued a temporary injunction pending its review of the Tribe's licensing process. On August 4 and 5, 1992, the district court held evidentiary hearings to review the licensing process.

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7. Miccosukee Tribal Gaming Agency is the Business Council of the Miccosukee Tribe of Indians of Florida.

Appendix E

On August 19, 1992, the district court entered its second omnibus order, determining that the Tribe's licensing process was "arbitrary and capricious" under the Administrative Procedure Act (APA), but also finding that the Tribe did not waive its sovereign immunity over the licensing process. Accordingly, the district court vacated its temporary injunction, denied TPL's emergency motion for a preliminary injunction, denied the Tribe's motion to dismiss, and stayed the action subject to the terms of the first omnibus order. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 803 F.Supp. 401 (S.D.Fla.1992) (*TPL II*). On August 21, 1992, TPL filed a motion for leave to file a supplemental complaint and an emergency motion for a preliminary injunction. On September 15, 1992, the district court denied both motions. TPL appealed.

On April 13, 1993, the Agency denied applications for gaming licenses of TPL, TDC, and Cye Mandel and John Sisto.[8] The Agency also appointed Kenneth Welt as conservator of Miccosukee Indian bingo. Welt removed TPL, TDC, Mandel, and Sisto from the premises on April 13, 1993, and the tribal court issued an order enforcing Welt's appointment. Thereafter, TPL filed a motion for an emergency hearing and an order enjoining the Tribe from exercising self-help. After a hearing on April 15, 1993, the district court issued its third omnibus order, lifting the stay because the Tribe violated the two-day notice provision in appointing Welt without giving notice, finding that the tribal court exceeded its jurisdiction because it affirmed Welt's

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8. Mandel and Sisto were officers, directors, and principal shareholders of TDC.

appointment, and declaring void the denial of the four license applications. The district court also declared void the appointment of Welt as conservator, denied Welt's motion to intervene, and granted TPL injunctive relief. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* No.92-0489-CIV-HIGHSMITH, slip op. at 6 (S.D.Fla. Apr. 15, 1993) (*TPL III*).

The Tribe filed an emergency motion for stay pending appeal in this court. This court granted the Tribe's motion for leave to appeal pursuant to 28 U.S.C. § 1292 and consolidated and expedited the appeals.[9]

III. CONTENTIONS

The Tribe, appellant, contends that the district court lacked subject matter jurisdiction to consider the commercial contract dispute between the Tribe and non-Indians on Indian lands. The Tribe contends that the Miccosukee Tribal Court had jurisdiction over this dispute and that tribal courts have exclusive jurisdiction over actions of non-Indians on reservation lands absent an affirmative limitation from federal treaties and statutes. Moreover, the Tribe contends that it did not waive its sovereign immunity nor relinquish its powers relating to the Tribe's right to regulate gaming.

Welt, appellant, contends that the Tribe's sovereign immunity bars this lawsuit. Welt also contends that although the district court has federal jurisdiction, pursuant to

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9. For purposes of this opinion, the Tribe and Welt are the appellants, and TPL is the appellee.

28 U.S.C. § 1331, to review a tribal court's exercise of its jurisdiction, the exhaustion doctrine bars the district court from the exercise of its jurisdiction until TPL has exhausted all tribal remedies.

The United States, participating as *amicus curiae* on behalf of the appellants, contends that the district court did not have subject matter jurisdiction because contract interpretation does not arise under federal law. Additionally, the United States contends that parties cannot create federal jurisdiction through agreement.

The National Indian Gaming Association, participating as *amicus curiae* on behalf of the appellants, contends that the contract dispute between the Tribe and TPL does not arise under federal law.

On the other hand, TPL, appellee, contends that this case does not involve a commercial contract dispute, but rather involves a tribe's improper use of its sovereign immunity. Additionally, TPL contends that the district court had jurisdiction over the Tribe's licensing process because the exhaustion doctrine's exceptions apply whenever an injustice would result. Thus, TPL contends that the district court properly exercised its jurisdiction to prevent the Tribe from frustrating the district court's jurisdiction.

IV. STANDARD OF REVIEW

"The subject matter jurisdiction of the district court is a question of law, and therefore, subject to *de novo* review." *United States v. Perez*, 956 F.2d 1098, 1101 (11th Cir.1992).

Appendix E

V. DISCUSSION

"Under our long standing interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' " *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 808, 106 S.Ct. 3229, 3232, 92 L.Ed.2d 650 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 9-10, 103 S.Ct. 2841, 2845-46, 77 L.Ed.2d 420 (1983)). "The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint' rule." *Oklahoma Tax Commission v. Graham,* 489 U.S. 838, 840, 109 S.Ct. 1519, 1520, 103 L.Ed.2d 924 (1989). The application of the well-pleaded complaint rule can defeat federal question jurisdiction. *Graham,* 489 U.S. at 841, 109 S.Ct. at 1521. According to the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987) (citing *Gully v. First National Bank,* 299 U.S. 109, 112-13, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936)). "The jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law." *Graham,* 489 U.S. at 841, 109 S.Ct. at 1521.

In this case, neither the verified complaint nor the supplemental complaint states a federal question.[10]

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10. We are aware that the district court denied TPL's motion for leave to file a supplemental complaint. We review the supplemental complaint, however, to determine if its filing would have cured the jurisdictional defect.

Specifically, the verified complaint states that "[t]his Court has jurisdiction pursuant to 28 U.S.C. § 1331," and then presents facts establishing a breach of contract claim. The supplemental complaint adopts the allegations of the verified complaint, including the jurisdictional basis, and then presents facts establishing that the Tribe is exercising self-help in violation of the management and economic development agreement (breach of contract).

The February 27, 1992, motion for preliminary injunction, the July 21, 1992, emergency motion for order enjoining Tribe from exercising self-help to terminate the management contract, and the August 21, 1992, emergency motion of Tamiami Partners for a preliminary injunction also fail to assert a federal question. The motions merely allege that the Tribe must arbitrate as the parties agreed.

On September 16, 1992, TPL filed a memorandum in support of its motion for preliminary injunction and a supplemental memorandum in support of its motion for injunctive relief. In these memoranda, TPL suggests for the first time that federal question jurisdiction exists because TPL is challenging the tribal court's assertion of jurisdiction over the dispute between TPL and the Tribe.

After oral argument, on June 4, 1993, TPL submitted a motion for leave to supplement oral argument. In this motion, TPL concedes that the original complaint "did not raise the federal question before the district court." Additionally, TPL suggests that not only did the original complaint not state a federal question, but also the proposed supplemental complaint failed to raise a federal question. Thus, TPL asks

that this court "deem the pleadings amended to remedy this procedural problem." We decline to do so.

TPL's mere assertion that the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, without alleging facts necessary to support a federal question, fails to give the district court subject matter jurisdiction. According to *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), to invoke a federal court's jurisdiction under section 1331, TPL must have asserted a claim " 'arising under' federal law." *National Farmers Union,* 471 U.S. at 850, 105 S.Ct. at 2450. The right to be protected against an unlawful exercise of tribal court judicial power is such a claim arising under federal law "because federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *National Farmers Union,* 471 U.S. at 851, 105 S.Ct. at 2451. As indicated earlier, however, TPL never pleaded such facts. *See Caterpillar,* 482 U.S. at 393 n. 7, 107 S.Ct. at 2430 n. 7 (finding that "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced"). Thus, TPL presented no federal question, and the district court did not have subject matter jurisdiction. *See Stock West, Inc.,* 873 F.2d at 1225 (finding "federal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe"); *Martinez v. Southern Ute Tribe,* 249 F.2d 915, 917 (10th Cir.1957) (finding that federal question jurisdiction does not exist simply because an Indian is a party or because the lawsuit involves Indian property or contracts), *cert. denied,* 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958); *Jackson v. United States,* 485 F.Supp. 1243, 1247 (D. Alaska 1980) (determining that merely because the

Secretary of the Interior approved a contract entered into with an Indian tribe, pursuant to 25 U.S.C. § 81, did not render a lawsuit arising from the contract one that presented a federal question).

Moreover, in this case, the Tribe's waiver of sovereign immunity is of no import. "[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished. . . ." *National Farmers Union,* 471 U.S. at 855-56, 105 S.Ct. at 2453. Even though the parties' agreement contains a limited waiver of the Tribe's sovereign immunity, this waiver cannot grant federal court jurisdiction where it otherwise would not exist — that is, this state law breach of contract claim is not appropriate for federal court jurisdiction.[11] *See Graham,* 489 U.S. at 841, 109 S.Ct. at 1521 (finding that state-law tax claims do not arise under federal law, and thus there is no independent basis for original federal jurisdiction, even though tribal immunity, a federal defense, is governed under federal law); *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 18 n. 17, 71 S.Ct. 534, 542 n. 17, 95 L.Ed. 702 (1951) (finding that consent of the parties cannot expand the jurisdiction of federal courts because it would allow federal

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11. In fact, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe v. Dept. of Game,* 433 U.S. 165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977). The Supreme Court has continuously acknowledged tribal courts' inherent power to exercise civil jurisdiction over non-Indians in conflicts affecting the interests of Indians on Indian lands. *See, e.g., Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

courts to become "the common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate in those courts"); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 671 (8th Cir.1986) (finding "[m]ere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit"). Under 28 U.S.C. § 1331, the district court only had subject matter jurisdiction to hear challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions.[12] *National Farmers Union,* 471 U.S. at 856-57, 105 S.Ct. at 2454.

Now that we have reviewed the record in this case, we are aware that when the court entered the third order on August 21, 1992, events had occurred and evidence was in the record that suggested a basis for district court jurisdiction. The district court did not have jurisdiction, however, because although the evidence was present, neither the complaint nor the supplemental complaint had sufficient allegations to meet the standard for district court jurisdiction. Because we are now aware of facts which suggest that the district court could have jurisdiction if the case arose today, we remand the case to the district court with directions that the district court dismiss this action unless one of the present parties files a

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12. The tribal court's determination is ultimately subject to review in the district court, but unless the federal court determines that the tribal court lacked jurisdiction, the federal court must defer to the tribal court and cannot allow relitigation of issues resolved in the tribal court. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 19, 107 S.Ct. 971, 978, 94 L.Ed.2d 10 (1987).

complaint or other pleading which properly alleges jurisdiction. If such a complaint or petition is filed within thirty days of the date of remand, the district court shall proceed to frame and determine the issues in the usual manner.

VI. CONCLUSION

We hold that the district court did not have subject matter jurisdiction over this action. Accordingly, we reverse the district court and remand for appropriate action consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX F — SECOND OMNIBUS ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND DECIDED AUGUST 19, 1992

TAMIAMI PARTNERS, LTD.,

Plaintiff,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendant.

CASE NO. 92-0489-CIV-HIGHSMITH

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

* * *

August 19, 1992, Decided

* * *

SECOND OMNIBUS ORDER

HIGHSMITH, District Judge.

THIS CAUSE came before the Court upon Plaintiff Tamiami Partners Ltd.'s ("Tamiami Partners") Emergency Motion for Order Enjoining Tribe from Exercising Self Help to Terminate Management Contract. On April 7, 1989, the

Appendix F

Miccosukee Tribe of Indians of Florida ("Tribe") entered into a Management and Economic Development Agreement ("Management Agreement") with Tamiami Partners, as authorized by Chapter 29, Title 25, of the United States Code, "Indian Gaming Regulation," *25 U.S.C.A. §§ 2701-21* (West Supp. Pamphlet 1991). Pursuant to the terms of the Management Agreement, Tamiami Partners currently operates a bingo hall ("the gaming enterprise") inside the Tribe's reservation.

On August 9, 1991, the Tribe adopted Ordinance No. 08-09-91, prescribing the licensing process for "primary management officials and key employees" of the gaming enterprise.[1] The ordinance empowers the Chief of Police to

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1. The Indian Gaming Regulatory Act ("IGRA") states, in pertinent part, that the Chairman of the National Indian Gaming Commission "shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming [such as bingo] on the Indian lands within the tribe's jurisdiction if such ordinance or resolution" provides, inter alia, an adequate system, which:

> (i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and
>
> (ii) includes—
>
> (I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt

(Cont'd)

conduct background investigations and to issue temporary permits pending the Tribal Gaming Agency's decision to issue or deny licenses.[2]

In early and mid-July 1992, the Tribal Gaming Agency announced its denial of seventeen applications. Asserting that these mass denials, which it characterizes as self-help, were decimating its work force and impeding its operation of the gaming enterprise, Tamiami Partners filed this emergency motion seeking injunctive relief from the Tribe's licensing process.

(Cont'd)

> notification to the Commission of the issuance of such licenses;
>
> (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and
>
> (III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any such licenses.

25 U.S.C.A. § 2710(b)(2)(F) (West Supp. Pamphlet 1991).

2. "Tribal Gaming Agency means the Business Council of the Miccosukee Tribe of Indians of Florida." Ordinance No. 89-09-91 of the Miccosukee Tribe of Indians of Florida Regarding Licensing of Certain Gaming Personnel [hereinafter "Ordinance No. 89-09-91"], Section 2.6.

Appendix F

The Court held an emergency hearing on this matter on Friday, July 24, 1992. After the hearing, the Court issued a temporary injunction pending the Court's review of the Tribe's licensing process. For purposes of this review, the Court held evidentiary hearings on August 4 and 5, 1992. In addition to the oral testimony, the Court has received numerous affidavits, as well as records of the licensing process, which the Tribe filed under seal pursuant to the Court's confidentiality order. The parties have also submitted the following motions and supplemental memoranda:

(1) Supplemental Memorandum in Support of Tamiami Partners, Ltd.'s Motion for Injunctive Relief;

(2) Motion of Miccosukee Tribe for Reconsideration of the Court's July 24, 1992, and Supplemental Memorandum;

(3) Tribe's Post-Hearing Memorandum in Opposition to Extending Emergency Injunction, and Tamiami Partners' Reply;

(4) Tribe's Memorandum Regarding Remedies and Redressability Issues, and Tamiami Partners' Reply;

(5) Tribe's Motion to Dismiss; and

(6) Tribe's Motion to Strike Affidavit of John Sisto and Portions of Affidavit of David Ingenito.[3]

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3. In its desire to afford each side a fair opportunity to fully present its position in this vigorously contested matter, the Court has examined all the materials submitted for its consideration. Accordingly, the Court denies this motion.

Appendix F

PROCEDURAL BACKGROUND

The Court is very familiar with the ongoing controversy between Tamiami Partners and the Tribe. Upon the filing of this action, Tamiami Partners sought an emergency injunction to compel arbitration, pursuant to the terms of the April 7, 1989 Management Agreement. Tamiami Partners also asked the Court to prevent the Tribe from taking any action to seize or assume control of the gaming enterprise pending arbitration.

Although the Court found that it had jurisdiction over the dispute, the Court chose to abstain from exercising its jurisdiction pending exhaustion of tribal remedies. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 788 F. Supp. 566, 570 (S.D. Fla. 1992).*[4] Rather than dismissing the action, however, the Court issued a stay, thereby keeping the federal forum readily available should circumstances no longer warrant the Court's abstention. *Id. at 570.* Accordingly, the Court specified that the stay would be automatically lifted upon the occurrence of any of the following events: exhaustion of tribal remedies; use of self-help by the Tribe to evict or otherwise impede Tamiami Partners from operating the gaming enterprise; or the provision of less than two business days' notice to Tamiami Partners of impending action pursuant to a tribal court order. *Id. at 567.*

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4. One day prior to the commencement of this action, the Tribe had filed a claim in tribal court seeking termination of the Management Agreement and other relief. *Id. at 567 n.3.*

Appendix F

THE PRESENT DISPUTE

As noted above, on August 9, 1991, the Tribe adopted an ordinance for licensing gaming personnel. Although the ordinance became effective August 19, 1991, the formal licensing process of Tamiami Partners' employees did not commence until December 17, 1991.[5] In addition, Tamiami Partners' investors submitted their licensing applications and new employees applied as they were hired. As provided by the licensing ordinance, upon receipt of the applications, the Police Department issued temporary permits to those applicants whose documents appeared to be in order.[6]

On July 3, 1992, the Tribe denied eight license applications. On July 22, 1992, the Tribe denied nine more applications. A review of the Tribe's confidential licensing records reveals that these seventeen denials included: the general manager and program director; the accounting manager; seven out of nine money room clerks; four bingo callers; the maintenance supervisor; and three investors.

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5. On November 8, 1991, the Executive Director of the National Indian Gaming Commission communicated to the Tribe the results of its informal review of the Tribe's ordinance and application forms. (Exhibit # 2, Defendant's Exhibit List, dated August 7, 1992.) On November 18, 1991, the Tribe posted a notice indicating which employees were required to apply for a gaming license. By November 20, 1991, Tamiami Partners had distributed applications supplied by the Tribe to the employees listed on the notice. On December 17, 1991, through previous arrangements made by Tamiami Partners, over forty Tamiami Partners employees personally submitted their applications to the Tribe's Police Department.

6. Ordinance No. 89-09-91, Section 6.

Appendix F

Contemporaneously with the seventeen denials, the Tribe approved sixteen applications, which, again according to the confidential licensing records, included: the two operations managers; the supervisor of cashiers; a concessions supervisor; a money room clerk; two table games supervisors; four bingo callers; four clerks; and one investor.[7] As of July 24, 1992, fifty-six applications were still pending, including the ninth money room clerk, the controller, an office supervisor, and various other employees and investors.

Tribal Ordinance No. 08-09-91 requires that Tamiami Partners "immediately terminate the employment" of an applicant whose license has been denied.[8] The sudden flurry of license determinations in July, after a seven-month period of inactivity, and the apparent singling-out for denial employees involved in the handling of money, led Tamiami Partners to seek injunctive relief from this Court. Tamiami Partners argued that the Tribe's licensing process constituted a "creative form of self-help" designed to impede Tamiami Partners from operating the gaming enterprise. Tamiami Partners, therefore, prayed that the Court lift its stay, prohibit further license denials, and direct the Tribe to proceed to arbitration on this and other pending disputes.[9]

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7. Although the Tribe stated at the July 24, 1992 hearing that seventeen applications had been approved, the Court can only find evidence of sixteen approvals from the licensing records. As noted below, on one particular applicant, the Agency reversed its initial approval. This may account for the discrepancy.

8. Ordinance No. 89-09-91, Section 8.2.2(b).

9. Prior to Tamiami Partners' filing of its emergency motion on July 21, 1992, the tribal court had not communicated to Tamiami

(Cont'd)

Appendix F

THE TEMPORARY INJUNCTION

After the emergency hearing held on July 24, 1992, the Court found that, as a result of the Tribe's licensing process, Tamiami Partners' work force had been decimated and that the working environment for Tamiami Partners' present and prospective employees offered little, if any, job security. Because these circumstances were seriously jeopardizing Tamiami Partners' ability to maintain its work force, the Court concluded that the Tribe's licensing process violated the terms of the stay order by impeding Tamiami Partners' operation of the gaming enterprise. Accordingly, the Court lifted its stay and issued a temporary injunction, which prohibited the Tribe from denying any additional license applications, pending the Court's review of the licensing process.[10]

(Cont'd)

Partners any ruling on the claim pending before it. On July 23, 1992, however, Tamiami Partners received by facsimile transmission a copy of the tribal court's order, dated July 16, 1992, directing the parties to initiate arbitration proceedings within thirty days in accordance with the Management Agreement provisions. Miccosukee Tribe of Indians v. Tamiami Partners, Ltd., No. CV. 92-07 (Miccosukee Tribal Court, July 16, 1992).

10. Order on Plaintiff's Emergency Motion, dated July 24, 1992.

Appendix F

THE LICENSING PROCESS

1. Standard of Review:

Because the Tribe conducted the licensing process in avowed compliance with one of the provisions of the Indian Gaming Regulatory Act ("IGRA"), *25 U.S.C.A. § 2710* (West Supp. Pamphlet 1991), the Court views the process as agency action and reviews it under the guidelines of the Administrative Procedure Act ("APA"), *5 U.S.C. § 706*(2) (West 1977). Section 706(2) provides, in pertinent part, that the Court may hold unlawful and "set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[11]

Judicial review under Section 706 of the APA should be highly deferential to the agency, with a presumption of administrative regularity. *Organized Fishermen v. Hodel, 775 F.2d 1544, 1550 (11th Cir. 1985)*, cert. denied, *476 U.S. 1169, , 90 L. Ed. 2d 978, 106 S. Ct. 2890 (1986)*. Hence, an "arbitrary and capricious" finding requires that the agency:

> Relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [arrived at a

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11. At the emergency hearing held on July 24, 1992, counsel for the Tribe conceded that the Tribe's licensing decisions were not unfettered and that they were subject to review under an "arbitrary and capricious" standard.

> decision] so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983)).* Where an agency engages in disparate treatment of similarly situated persons, a reviewing court may find such action arbitrary and capricious. *Keen Transport, Inc. v. United States, 446 F. Supp. 5, 8 (N.D. Ohio 1976)* (finding "palpably arbitrary and capricious" the Interstate Commerce Commission's "complete disregard of a uniform policy" in processing carriers' applications). See also *Basic Media, Ltd. v. FCC, 182 U.S. App. D.C. 209, 559 F.2d 830, 833 n.2 (D.C. Cir. 1977)* (stressing the need for uniform treatment of similarly situated applicants).

2. The Tribe's criteria for issuing licenses:

As noted earlier, IGRA provides a mechanism for weeding-out persons whose prior record or unsavory reputation would lead to unsuitable, unfair, or illegal class II gaming practices.[12] This provision furthers one of Congress' declared legislative policies in enacting IGRA, namely, "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." *25 U.S.C.A. § 2702*(2) (West Supp. Pamphlet 1991).

As one reason for denial of licenses, therefore, the Tribe's licensing ordinance provides the same unsuitability criteria as IGRA:

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12. See supra note 1.

Appendix F

> The applicant is a person whose prior activities, including, but not limited to, criminal record, if any, or reputation, habits or associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unfair or illegal practices, methods, or activities in the conduct of a gaming enterprise.

Ordinance No. 89-09-91, Section 8.1(a).

The ordinance also provides an alternative basis for license denial, not found in IGRA, where:

> The applicant has failed to comply with the application requirements of Sec. 4.1., or to reveal a fact material to such application, or has furnished any information which is untrue or misleading in connection with such application.

Ordinance No. 89-09-91, Section 8.1.(b).

The application requirements of Section 4.1 include: personal identification; education history; employment history; prior or existing gaming licensing experience; financial statement; military record; arrest record; fingerprints; photograph; applicable fees; authorization and release for background investigation; and such other information that the Tribal Gaming Agency may require. Ordinance No. 89-09-91, Section 4.1.[13]

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13. In his November 8, 1991 letter to the Tribe, the Executive Director of the National Indian Gaming Commission indicated that, based on his informal review, the information being requested by the Tribe appeared appropriate. (Exhibit #2, Defendant's Exhibit List, dated August 7, 1992.)

Appendix F

3. Application of the "arbitrary and capricious" standard:

In reviewing the Tribe's confidential licensing records, the Court finds that the licensing decisions announced so far meet the arbitrary and capricious standard. Specifically, the Court finds that the Tribe has engaged in disparate treatment of similarly situated individuals, making its proffered explanations for license issuance or denial inconsistent and contradictory. Mindful of the confidential nature of the records, the Court limits itself to pointing out, in general terms, the basis for this conclusion.

Upon reviewing the licensing records, the Court has noted an apparently pre-determined slant that carries through the background summaries, the Chief of Police's recommendations, and the Tribal Gaming Agency's determinations. With one exception, a positive background report resulted in the Chief of Police's recommendation for approval, and the Tribal Gaming Agency's adoption of this recommendation without discussion.[14]

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14. The exception was a bingo caller classified as a poor credit risk whose driving license had been suspended on three occasion for failure to pay traffic citations. The investigator advised the applicant to seek credit counseling, characterized the credit history as "questionable" and glossed over the license suspensions, concluding that this information would not affect his position as bingo caller. The Chief of Police recommended approval, essentially repeating the investigators findings and conclusions. After approving this applicant, however, the Agency reversed itself upon counsel's advise that such approval could not be limited to the position of bingo caller absent a revision of the application form.

Appendix F

For applicants who received approval, for example, investigators: down played a shoplifting incident by characterizing it as "suspicion of petit larceny;" justified poor credit histories on the basis of divorce, past drug abuse, inability to pay, and desire to pay, even recommending credit counseling to some of the applicants; justified a false claim of high school graduation on the basis that education information did not include high school, even though copies of high school diplomas were required from other applicants; cited as the explanation for an applicant's failure to disclose outstanding debts that the applicant was not aware of such requirement; permitted an applicant to provide further information on his status as a corporate officer; and generally sought out further information from the applicants when such information was missing.

Conversely, investigators' comments in the background summaries of the applicants who were denied licenses bear a negative coloring. In reviewing these records, the Court repeatedly found that investigators seized on conduct or information problems, which had been treated lightly in the approval cases, and turned them into grounds for license denial. The Chief of Police similarly stressed these problems in his report to the Agency. Moreover, in contrast with the approval recommendations, which passed without discussion, the Agency took up and reviewed each of these negative reports individually, again highlighting defects that it had not even bothered to discuss in the approved applications. Investigators, for example: characterized a shoplifting incident as an arrest and booking on the charge of grand theft; found fatal an applicant's failure to disclose debts under her maiden name; did not consider information because the applicant had it entered on the back "of the wrong

page" of an application; afforded an applicant no opportunity to clarify his status as a corporate officer; complained about an applicant's failure to acknowledge misstatements until "confronted by the investigator;" and generally took pains to point out failures to disclose information, quoting the language in the application requiring such information.

A WRONG WITHOUT A REMEDY

Although the Court finds the Tribe's licensing process to be arbitrary and capricious under the APA standards, the Court finds that it would be acting contrary to law if it granted Tamiami Partners the remedy it seeks. The following analysis has led the Court to this conclusion.

Tamiami Partners brought this action to enforce the arbitration provisions of the Management Agreement and to prevent the Tribe from taking any action to seize or assume control of the gaming enterprise pending arbitration. Through its order compelling arbitration, the tribal court has granted Tamiami Partners part of the relief it sought from this Court.[15] The protective relief sought by Tamiami Partners remains available through the Court's stay, rather than dismissal, of this action pending the outcome of arbitration.[16]

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15. In its July 16, 1992 Order, the tribal court directed the parties to proceed to arbitration. On August 5, 1992, the Tribe notified this Court of its intention to comply with the tribal court order. The tribal court, however, retained jurisdiction over the claim before it, pending the outcome of arbitration, and to hear non-arbitrable claims.

16. In this regard, the Court finds unpersuasive the Tribe's arguments, advanced in its motion to dismiss, that the tribal court's

(Cont'd)

In its efforts to trigger this protective relief, Tamiami Partners has characterized the Tribe's licensing process as "creative self-help." The Court concurred with this depiction when it issued the temporary injunction that has preserved the status quo. Closer scrutiny of the issues involved, however, reveals two serious jurisdictional obstacles that prevent the Court from adopting Tamiami Partners' own creative portrayal of the Tribe's licensing process. These problems are: IGRA's lack of a statutory grant of jurisdiction to the district courts for the purpose of reviewing gaming license determinations; and the Tribe's sovereign immunity, which the Tribe has narrowly waived only for purposes of enforcing the terms of the Management Agreement.

1. IGRA's silence on reviewability of licensing determinations:

A thorough review of the licensing provisions in the Indian Gaming Regulatory Act,[17] its legislative history,[18] and

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(Cont'd)
acceptance of jurisdiction and arbitration order oust this Court of jurisdiction in this action. As noted in the Omnibus Order, the Court has federal question jurisdiction to review the tribal court's exercise of judicial power over non-Indians. *Tamiami Partners, 788 F. Supp. at 568*. Accordingly, the Court denies the Tribe's motion to dismiss.

17. P.L. 100-497, 102 Stat. 2467 (1988), codified at *25 U.S.C.A. §§ 2701*-21 (West Supp. Pamphlet 1991).

18. S.R. No. 446, 100th Cong., 2nd Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3071-106.

the proposed federal regulations,[19] convince this Court that Congress did not consider the interests of non-Indian parties who choose to invest in Indian gaming. The purpose of IGRA is to benefit Indian tribes; the purpose of IGRA's licensing provisions is to prevent organized crime and other corrupting influences from infiltrating Indian gaming. Period, full stop. Congress would not have been too far off the mark if it had borrowed the following subtitle for IGRA from Dante's Inferno: "All hope abandon ye who enter here!"[20]

Absent a statutory grant of jurisdiction, the Court finds that it cannot declare unlawful a licensing process that, nevertheless, disturbs its conscience. "The APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders, 430 U.S. 99, 107, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)*. Moreover, although aggrieved individuals might challenge their license denials on due process grounds after exhaustion of tribal remedies,[21] Tamiami Partners has no standing to contest the denial of licenses to particular individuals.

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19. National Indian Gaming Commission, *57 Fed. Reg. 30,346 (1992)* (to be codified at 25 C.F.R. §§ 515, 519, 522-24, 556, 558); National Indian Gaming Commission, *57 Fed. Reg. 30,584 (1992)* (to be codified at 25 C.F.R. 571, 573, 575, 577).

20. Dante, Divine Comedy, Inferno, canto III, 1.9, cited in John Bartlett, Familiar Quotations 140 (15th ed. 1980).

21. Ordinance No. 89-09-91, Section 11, provides judicial review of license denials in tribal court. The Court makes no comment on this process, as the individual applicants are not before it.

2. The Tribe's sovereign immunity:

The Court has noted that the Tribe's narrow waiver of its sovereign immunity is limited to enforcement of the terms of the Management Agreement. The Tribe contends that, in conducting the licensing process, the Tribe is acting as a sovereign, and not as a party to the Management Agreement. *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 145-46, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982).* The Court issued the temporary injunction mindful of this distinction, with which it agreed. Nevertheless, relying on a concurring opinion by Justice Stevens, the Court granted Tamiami Partners prospective equitable relief. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 111 S. Ct. 905, 912-13, 112 L. Ed. 2d 1112 (1991)* (Stevens, J. concurring).

In his Oklahoma Tax Comm'n concurrence, Justice Stevens stated:

> My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity — the Tribe — is completely immune from legal process. By addressing the substance of the Tax Commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief.

Oklahoma Tax Comm'n, 111 S. Ct. at 913 (Stevens, J. concurring). Id. at 912. The basis for this statement is the

following passage from the majority opinion: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." Id. at 911. Despite its acknowledgment of this obligation, the majority concluded, however, that Oklahoma could not enforce this obligation through the most efficient remedy, a suit against the Tribe, due to the doctrine of sovereign immunity. Id. at 912.

The Eleventh Amendment bars suits against states in federal courts.[22] A well-established Eleventh Amendment fiction requires a party to bring federal suits against a state official, rather than the state itself. *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*. This legal fiction extends to suits seeking equitable relief. *Alabama v. Pugh, 438 U.S. 781 (1978)* (per curiam) (The issuance of a mandatory injunction against the State of Alabama was barred by the Eleventh Amendment absent Alabama's consent to the filing of such a suit.).

Scholars and jurists have roundly criticized this mirage, as well as other aspects of Eleventh Amendment jurisprudence. See e.g. *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-302, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)* (Brennan, J. dissenting) (presenting an extraordinarily learned historical analysis of Eleventh Amendment doctrine

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22. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

and concluding that the doctrine, as developed, is pernicious). See also *Oklahoma Tax Comm'n, 111 S. Ct. at 912* (Stevens, J. concurring) ("In my opinion, all Governments — federal, state, and tribal — should generally be accountable for their illegal conduct."); *Edelman v. Jordan, 415 U.S. 651, 667 (1974)* ("The difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between night and day."). Nevertheless, the United States Supreme Court has extended Eleventh Amendment jurisprudence to cases involving Indian tribes, where its fictions are now firmly entrenched. See *Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991)* (An Indian tribe's immunity from suit "extends to suits for declaratory and injunctive relief.") (citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)*); *Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 1992 WL 160190,* at *3 (10th Cir. July 14, 1992) (Stating, on remand from the United States Supreme Court, that the "Supreme Court's opinion does not permit the Tax Commission to enforce the Tribe's legal obligation through the federal courts.")

Tamiami Partners' forceful argument that the Tribe, the Tribal Gaming Agency, and Tribal officers are one and the same entity with one and the same goal — to oust Tamiami Partners from the gaming enterprise — partakes of the realism found in Justice Stevens and Justice Brennan's opinions. The weight of precedent, however, does not permit this Court to sponsor this assessment. Therefore, having found that the Tribe's narrow waiver of sovereign immunity does not extend to its licensing process, the Court concludes that the Tribe has not consented to federal suits relating to

this process. Absent the Tribe's consent, the Court lacks jurisdiction to issue injunctive relief against the Tribe's licensing process in this action. Accordingly, the Court vacates its temporary injunction and denies Tamiami Partner's emergency motion for a preliminary injunction.

CONCLUSION

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that:

(1) The Motion of Miccosukee Tribe for Reconsideration of the Court's July 24, 1992, and Supplemental Memorandum is GRANTED;

(2) The Court's TEMPORARY INJUNCTION prohibiting the Tribe from denying the license applications of Tamiami Partners employees is VACATED;

(3) Tamiami Partners' Emergency Motion for Order Enjoining Tribe from Exercising Self Help to Terminate Management Contract and Supplemental Memorandum in Support of Tamiami Partners, Ltd.'s Motion for Injunctive Relief are DENIED;

(4) The Tribe's Motion to Dismiss is DENIED;

(5) The Tribe's Motion to Strike Affidavit of John Sisto and Portions of Affidavit of David Ingenito is DENIED; and

(6) This action is STAYED subject to the terms of the Court's Omnibus Order, dated March 5, 1992.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 19th day of August, 1992.

SHELBY HIGHSMITH

UNITED STATES DISTRICT JUDGE

APPENDIX G — OMNIBUS ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND DECIDED MARCH 5, 1992

TAMIAMI PARTNERS, LTD.,

Plaintiff,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Defendant.

CASE NO. 92-0489-CIV-HIGHSMITH

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

March 5, 1992, Decided

* * *

OMNIBUS ORDER

THIS CAUSE came before the Court upon Tamiami Partners Ltd.'s ("Tamiami Partners") Motion for Preliminary Injunction to compel arbitration, pursuant to the terms of a management agreement between Tamiami Partners and the Miccosukee Tribe of Indians of Florida ("Tribe") for the operation of the Tribe's gaming establishment; and to stay the Tribe from impeding Tamiami Partners' operation of the gaming facilities. The Court held a hearing on Friday,

February 28, 1992, which was recessed until the following Monday, March 2, 1992. Pending resumption of the hearing, the Court issued a Temporary Restraining Order maintaining the status quo.[1] At the conclusion of the second hearing, the Court continued the Temporary Restraining Order until rendition of this order.[2]

Prior to resumption of the hearing on March 2, 1992, the Tribe filed a memorandum of law in opposition to the motion for preliminary injunction, and moved to dismiss the complaint. Tamiami Partners opposed the motion to dismiss, and also moved to strike all factual assertions proffered by the Tribe in its memoranda.

For the reasons more fully stated below, it is hereby

ORDERED AND ADJUDGED that

(1) The Temporary Restraining Order, dated February 28, 1992 is VACATED;

(2) Tamiami Partners' Motion for Preliminary Injunction is DENIED;

(3) The Tribe's Motion to Dismiss is DENIED;

(4) Tamiami Partners' Motion to Strike is DENIED as moot; and

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1. Transcript of Proceedings on February 28, 1992, at 31-32. See Temporary Restraining Order, dated February 28, 1992.

2. Transcript of Proceedings on March 2, 1992, at 64.

(5) This action is STAYED. The stay will be automatically lifted upon the occurrence of any one of the following events:

i. Exhaustion of tribal remedies, as more fully explained below.

ii. Self-help on the part of the Tribe to evict or otherwise impede Tamiami Partners from operating the gaming enterprise.

iii. Failure on the part of the Tribe to provide Tamiami Partners with two (2) business days' notice, prior to taking any action pursuant to a Tribal Court order.

FACTUAL BACKGROUND

Defendant Miccosukee Tribe of Indians of Florida ("Tribe") is a federally recognized tribe of Indians. (Verified Complaint, at P3.) As such, the Tribe may establish gaming activities on its lands, pursuant to Chapter 29, Title 25, of the United States Code, "Indian Gaming Regulation." *25 U.S.C.A. §§2701-21* (West Supp. Pamphlet 1991). The gaming regulation statutes, moreover, permit tribes to enter into management contracts for the operation of "class II gaming" activities. *25 U.S.C.A. §2711* (West Supp. Pamphlet 1991). These class II gaming activities include bingo, and similar games, such as "pull-tabs, lotto, punch boards, tip jars, and instant bingo." *25 U.S.C.A. §2703* (7) (West Supp. Pamphlet 1991).

In accordance with such federal authorization, the Tribe entered into a Management and Economic Development

Agreement ("Agreement") with Tamiami Partners on April 7, 1989. (Verified Complaint, Exhibit 1). Pursuant to the terms of the Agreement, Tamiami Partners currently operates a bingo hall ("the Enterprise") inside the Tribe's reservation. (Verified Complaint, at P7).

On January 28, 1992, the Tribe notified Tamiami Partners by letter that, "effective 30 days from the date hereof," the Agreement was terminated. (Verified Complaint, Exhibit 2, at 1.) Tamiami Partners responded to the Tribe's letter on February 4, 1992, disputing all of the Tribe's grounds for termination, and concluding that Tamiami Partners considered the "purported termination a nullity." (Verified Complaint, Exhibit 3, at 5.) The Tribe acknowledged receipt of this response on February 11, 1992, but reasserted its position that "the Notice of Termination is operative and this Agreement will terminate on February 28, 1992." (Verified Complaint, Exhibit 4, at 1.) On February 25, 1992, Tamiami Partners made a formal demand for arbitration to determine the validity of the Tribe's termination notice, pursuant to the Agreement's arbitration clause. (Verified Complaint, Exhibit 5, at 1.) Article 12 of the Agreement, entitled "Disputes — Arbitration," provides, in pertinent part: "All disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration, as set forth in this Article 12." (Verified Complaint, Exhibit 1, at 30.) Tamiami Partners also requested that the Tribe respond to its arbitration demand by noon, February 26, 1992 and indicated that, absent such response, it would assume the Tribe's reply to be negative. (Verified Complaint, Exhibit 5, at 2.) The Tribe did not respond, filing instead a "Statement of Claim"

in the Miccosukee Tribal Court. (Verified Complaint, Exhibit 6.)[3] Tamiami Partners, in turn, filed the above-styled case on February 27, 1992.[4]

FEDERAL QUESTION JURISDICTION

Tamiami Partners invokes this Court's federal question jurisdiction, pursuant to *28 U.S.C.A. §1331* (West 1966 & Supp. 1991).[5] As more fully discussed below, this case requires that the Court construe an agreement between Indians and non-Indians that includes a limited waiver of sovereign immunity by the Tribe; and that, on its face, provides for arbitration of all disputes arising from the agreement. The Court must interpret these contractual provisions to determine whether it should compel arbitration,

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3. The tribal court claim is an action for declaratory and injunctive relief. (Verified Complaint, Exhibit 6, at 1.) It prays for an order declaring that the Agreement is terminated; directing that the Tribe assume control of the Enterprise; enjoining Tamiami Partners from interfering with such assumption; directing tribal police to enforce the order; and granting attorneys' fees and costs. *Id.* at 16.

4. Tamiami Partners' Verified Complaint prays for the entry of a declaratory judgment, holding that the Tribe is bound by the Agreement's arbitration clause; and for an injunction compelling arbitration and enjoining the Tribe from taking any action to seize or assume control of the Enterprise pending arbitration. (Verified Complaint, at 8-9.)

5. Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

thereby enjoining prosecution of a claim filed by the Tribe in tribal court. The case therefore, presents a federal common law question — the exercise of Tribal Court judicial power over non-Indians. *National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)* ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under §1331.")

THE TRIBE'S SOVEREIGN IMMUNITY

Having established that it has subject matter jurisdiction, the Court must next address the threshold issue of the Tribe's sovereign immunity. "Indian tribes are 'domestic dependent nations,' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 112 L. Ed. 2d 1112, 111 S. Ct. 905, 909 (1991)* (citing *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831))*. "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n, 111 S. Ct. at 909* (citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978))*. See also *Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517* (5th Cir.), cert. denied, *385 U.S. 918, 87 S. Ct. 227, 17 L. Ed. 2d 143 (1966)* ("Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization.") (citations omitted).

In Article 23 of the Agreement, the Tribe, denominated "Owner" in the Agreement, waives its sovereign immunity from suit, subject to the following limitations:

> The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) Owner fails to participate in an arbitration proceeding invoked as provided in Article 12 [the arbitration clause], or (ii) failure by Owner to abide by the terms of an arbitration award. . . . This waiver of sovereign immunity shall not become effective until Manager [Tamiami Partners] has given notice to the Miccosukee Tribal Business Council, detailing the nature of the complaint and the Owner shall have failed after 30 days following such notice to cure such complaint.

(Verified Complaint, Exhibit 1, at 43.) This waiver clause is clear and unambiguous. Pursuant to Oklahoma Tax Comm'n, therefore, the clause effectively waives the Tribe's sovereign immunity, subject to the stated conditions. The first condition that applies to this case is met by the Tribe's failure to participate in an arbitration proceeding invoked by Tamiami Partners in their letter dated February 25, 1992.[6] By filing a

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6. At the hearing held in this matter, counsel for the Tribe stated its position that the language of the arbitration clause does not encompass termination. (Transcript of Proceedings on Monday, March 2, 1992, at 5). The Court finds, however, that the plain (Cont'd)

claim in Tribal Court only one day after this arbitration demand, the Tribe effectively rejected the orderly arbitration proceedings contemplated by the Agreement.[7]

The second condition precedent to the waiver of sovereign immunity is the thirty-day cure notice provision, which Tamiami Partners concedes it has not fulfilled.[8] Conditions precedent require substantial performance. *Goodwin v. Jacksonville Gas Corp., 302 F.2d 355 (5th Cir. 1962)*. Because the Tribe had already issued its own thirty day termination notice, which Tamiami Partners alleges constitutes a breach of the Agreement, however, Tamiami Partners' compliance with the thirty-day cure notice provision, asking the Tribe not to terminate the agreement, would have served no purpose. *Solitron Devices v. Honeywell, Inc., 842 F.2d 274 (11th Cir. 1988)* (Where a contract has already been terminated by the party allegedly in breach, the suing party's compliance or lack of compliance with a termination clause is irrelevant.).

(Cont'd)
language of the arbitration clause, which includes disputes over breach of the Agreement, does encompass an allegedly wrongful termination.

7. Nothing transpired in the hearings that would indicate to this Court the Tribe's willingness to voluntarily engage in the arbitration process contemplated by the Agreement.

8. Transcript of Proceedings on Friday, February 28, 1992, at 12. The Tribe's position, as stated by counsel on the second day of the hearing, is that they regard the service of the Verified Complaint in this action to constitute cure notice required by Article 23 of the Agreement. (Transcript of Proceedings on Monday March 2, 1992, at 8).

Therefore the Court finds that the Tribe's actions — issuing a thirty-day termination notice and bypassing the arbitration process for recourse to Tribal Court — resulted in a waiver of strict compliance with the thirty-day cure notice provision. The Tribe, therefore, has effectively waived its sovereign immunity and is subject to the jurisdiction of this Court, pursuant to Article 23 of the Agreement.

EXHAUSTION OF TRIBAL REMEDIES

Despite the operation of Article 23 of the Agreement, waiving the Tribe's sovereign immunity, the Court must next consider the propriety of abstaining from exercising its jurisdiction, in light of the doctrine of exhaustion of tribal remedies. The United States Supreme Court has developed this doctrine to further the longstanding federal policy of encouraging tribal self-government, in which tribal courts play a vital role. *Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 14, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987).* See also *National Farmers Union, 471 U.S. at 857* ("Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.")

By abstaining from exercising its jurisdiction at this juncture and permitting the Miccosukee Tribal Court to determine its own jurisdiction over this dispute, which arises over non-Indian gaming activities on the Tribe's reservation, the Court would be furthering these federal policies. *Iowa Mut., 480 U.S. at 18* ("Tribal authority over the activities of

non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute.") (citations omitted). Moreover, abstention would also further the Congressional policy of the federal statute that permits the Agreement underlying this action. *25 U.S.C.A. §2702*(3) (West Supp. Pamphlet 1991).[9]

STAY OF FEDERAL ACTION

In light of these federal objectives, therefore, the Court chooses to abstain from exercising its jurisdiction, pending exhaustion of tribal remedies. The Court emphasizes, however, that application of the exhaustion doctrine does not deprive it of subject-matter jurisdiction. *Iowa Mut., 480 U.S. at 16 n.8* ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.") (citing *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)).*

Rather than dismiss the federal action, therefore, the Court chooses to stay it. *National Farmers Union, 471 U.S. at 857* ("Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court.").

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9. Section 2702, the Congressional declaration of policy for Chapter 29, states that the purpose of the chapter is, *inter alia,* "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.*

Moreover, a stay of the federal action is preferable to a dismissal, in order to keep the federal forum readily available if warranted by "a significant change of circumstances." *Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187, 1188 (9th Cir. 1983)* (citing *Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594, 20 L. Ed. 2d 835, 88 S. Ct. 1753 (1968))*. Against the contingency that such a change in circumstances may arise, therefore, the stay will be automatically lifted upon exhaustion of tribal remedies, upon the use of self-help by the Tribe, or upon the provision of less than two business days' notice to Tamiami Partners of impending action pursuant to a Tribal Court order.

CONCLUSION

This Court finds that it has jurisdiction over the subject matter and the parties in this case. In deference to the federal common law doctrine of exhaustion of tribal remedies, however, the Court chooses to stay this action, subject to the terms outlined above.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 5th day of March, 1992.

SHELBY HIGHSMITH

UNITED STATES DISTRICT JUDGE

APPENDIX H — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 15, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-5262

TAMIAMI PARTNERS, LTD. by and through TAMIAMI DEVELOPMENT CORP., its general partner,

Plaintiff-Appellee,

versus

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; BILLY CYPRESS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.3d __).

Before: TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

Appendix H

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX I — RELEVANT STATUTES

25 U.S.C.S. § 2701 (1999)

§ 2701. Findings

The Congress finds that —

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes *(25 U.S.C. 81)* requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

* * *

Appendix I

25 U.S.C.S. § 2702

§ 2702. Declaration of policy

The purpose of this Act is —

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * *

Appendix I

25 U.S.C.S. § 2710

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if —

> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

Appendix I

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that —

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than —

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which —

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes —

(I) tribal licenses for primary management officials

and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if —

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the

Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if —

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act [*25 USCS § 2712*],

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [*25 USCS § 2717*(a)(1)] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which —

> (A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and
>
> (B) has otherwise complied with the provisions of this section[,] may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has —

> (A) conducted its gaming activity in a manner which —
>
> (i) has resulted in an effective and honest accounting of all revenues;
>
> (ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for —

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation —

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [*25 USCS § 2706*(b)(1)-(4)];

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [*25 USCS § 2710*(b)(2)(C)] and shall submit to the Commission a complete resume on

all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 [*25 USCS § 2717*] in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

* * *

25 U.S.C.S. § 2711

§ 2711. Management contracts

(a) Class II gaming activity; information on operators.

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1) [*25 USCS § 2710*(b)(1)], but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or

management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval. The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least —

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net

revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension. By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that —

(1) any person listed pursuant to subsection (a)(1)(A) of this section —

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land. No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority. The authority of the Secretary under section 2103 of the Revised Statutes *(25 U.S.C. 81)*, relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) Investigation fee. The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

* * * *